The Central Law Journal.

ST. LOUIS, OCTOBER 31, 1890.

IT is to be regretted that congress adjourned without taking final action upon the bankruptcy bill, and the bill for the relief of the Supreme Court of the United States. Though the former passed the house, where its chances were not at the first regarded as of the brightest, it failed to pass the senate, where it was thought favorable consideration would at once be had. It was called up by one of the senators during the closing session of congress, on a motion to re-commit to the judiciary committee, with instructions to amend by making it apply to voluntary bankruptcy only. Though the principal senators agreed that it is absolutely impracticable to have a national bankruptcy law that deals with voluntary cases only, the friends of the bill concluded not to ask its consideration until the next session.

IT seems that a conference was found necessary to determine the features of the bill for the relief of the Supreme Court of the United States. The house passed the bill heretofore noted by us, for which, however, the senate thereafter passed a substitute. The senate bill provides for the appointment of an additional circuit judge with the same compensation as other circuit judges. It creates in each circuit, a circuit court of appeals to consist of three judges, and which is to be a court of record with appellate jurisdiction. Terms are held annually in each of the judicial circuits. No appeal is allowed from any district court to the existing circuit courts, and no appellate jurisdiction is hereafter to be exercised or allowed by the existing circuit courts, but all appeals by writ of error or otherwise from the district courts are only to be subject to review in the Supreme Court of the United States, or in the circuit court of appeals established by the bill. Appeals or writs of error may be taken from the district courts or existing circuit courts direct to the supreme court in the following cases, viz: From the final sentences and decrees in prize causes; in cases of conviction of a capital or otherwise infamous crime; in any case that involves the construction or application of the constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question, and in any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States. This bill is thought by those who are familiar with the subject to be, in many respects, more satisfactory than the one passed by the house.

A critical examination of the two bills will reveal the fact that each contains features of value, and that a compromise, or rather the amalgamation of the good features of both is to be desired and will probably be adopted. To us there does not seem any necessity for retaining the existing circuit courts which the senate bill proposes, but which the house bill does away with, leaving the district court as the only court of original jurisdiction. Again, the addition of two circuit judges by the house bill instead of one, as proposed by the senate bill, seems to be more sensible, looking into the future. Indeed, it is understood that the suggested decrease in the number to be appointed is largely a matter of politics. On the other hand, the provision of the senate bill for the appeal of certain cases, above specified, from either the district or existing circuit courts, direct to the Supreme Court of the United States, and not, as contemplated by the house bill, through the intermediate appellate court, is a wise one. Thus, features of both bills might be suggested as being valuable, and it is to be hoped that the conference committee, with the material on hand, will at the next session of congress evolve a satisfactory enactment on the subject.

As if to emphasize what we had to say recently, on the subject of journalistic dishonesty, and the tendency on the part of some of the law newspapers to make free use of our columns without due credit, the October number of *The Law*, of Chicago, has made its appearance, containing the very excellent poem of D. L. Cady, Esq., on "Smith v. Marrable," which was written for us and published some time ago. The editor of that magazine appropriated it without any mention of us whatever. Some might be disposed to

call this Chicago enterprise, but we prefer to call it by its true name—stealing.

We observe, also, that the *Washington Law Reporter*, an excellent paper not often guilty of the offense, copies and prints our article on "The Granting of a Power of Attorney by an Infant" though with proper credit to us. Inasmuch as our articles are written for us and paid for liberally, we hardly think it fair that other journals should attempt to profit thereby at no expense to themselves. Though we do not object to a reference to such articles, or even to a very liberal abstract of them, we naturally take exceptions to their entire reproduction.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—CORPORATIONS.—Through inadvertence we have heretofore failed to notice a very important question, discussed by the Supreme Court of the United States in Nashua & L. R. Corp. v. Boston & L. R. Corp., 10 S. C. Rep. 1004. There it appeared that plaintiff was created a corporation in New Hampshire. Subsequently the same persons forming such corporation were constituted a corporation under the same name by the legislature of Massachusetts. Thereafter, acts were passed, first in Massachusetts and then in New Hampshire, to unite the two corporations, and providing that all the tolls, franchises, rights and property of the two corporations should be held and enjoyed by the stockholders in proportion to their number of shares in either or both of the corporations. It was held that, for the purpose of determining the jurisdiction of the federal court, claimed on the ground of diverse citizenship in a suit by plaintiff against a citizen of Massachusetts, plaintiff would be considered as a citizen of New Hampshire. Field, J., says, after citing Farnum v. Canal Corp., 1 Sum. 46; Muller v. Dows, 94 U. S. 444; Penn. R. Co. v. St. Louis, A. & T. H. Ry. Co., 118 U. S. 290; Racine & M. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331; Bridge Co. v. Adams Co., 88 Ill. 619:

> There are many decisions both of the federal and State courts which establish the rule that however closely two corporations of different States may unite their interests, and though even the stockholders of the one may become the stockholders of the other and their business be conducted by the same directors the separate identity of each as a corporation of the State by which it was created, and as a citizen of that State, is not thereby lost. * * * In Railroad Co. v. Auditor General, 53 Mich. 91, 18 N. W. Rep. 586, it appeared that the general railroad law of Michigan made roads that lie partly within and partly without the State taxable on so much of their gross receipts as corresponded to the ratio of their local to their entire length. A local company was consolidated with a foreign one that controlled a number of other consolidated roads, and several leased lines besides; and in considering the effect of the consolidation the court said, speaking by Chief Justice Cooley: "It is familiar law that each corporation has its existence and domicile, so far as the term can be applicable to the artificial person, within the territory of the sovereign creating it. * * * It comes into existence there by an exercise of sovereignty will; and though it may be allowed to exercise corporate functions within another's sovereignty, it is impossible to conceive of one joint act, performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."
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> It would seem clear from the decisions we have cited, as well as on general principles, that the plaintiff in this case must be considered simply in its character as a corporation created by the laws of New Hampshire, and as such a citizen of that State, and so entitled to go into the circuit court of the United States and bring its bill against a citizen of any other State, and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts as to defeat its right to go into the circuit court of the United States in that district. If the position taken by defendants could be maintained, then they could sue in the federal court in New Hampshire the New Hampshire corporation, while that corporation could not enforce its claims in the federal court of Massachusetts against the Massachusetts corporation. From the cases we have cited, it is evident that by the general law, railroad corporations created by two or more States though joined in their interests, in the operation of their roads, in the issue of their stock and in the division of their profits, so as practically to be a single corporation, do not lose their identity, and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it is created. The union of name, of officers, of business and of property does not change their distinctive character as separate corporations.

MORTGAGE—VENDOR AND VENDEE—TRANSFER OF MORTGAGED LAND.—The Supreme Court of Massachusetts, in Rice v. Sanders, 24 N. E. Rep. 1079, consider an interesting question as to the effect of the transfer of mortgaged land, and the liability of the vendee

thereof in the assumption of the mortgages. It was there held that where defendant, by a deed conveying land to him, agrees to pay two mortgages on the land, he undertakes not only to relieve the grantor from personal liability under the mortgages, but to discharge the lien of the mortgages, and the grantor is interested in having the lien of the first mortgage discharged for the improvement of the security of the second; and, in an action by the grantor for failure to pay the first mortgage, while plaintiff may have been relieved from liability thereunder through a sale of the land, he may still recover as damages the amount of the debt secured by the second mortgage, though the latter mortgage is not yet due. Knowlton, J., says:

One who assumes a mortgage in such an agreement takes upon himself the burden of the debt or claim secured by the mortgage, and there is no doubt that as between him and his grantor, he becomes the principal, and the latter merely a surety for the payment of the debt. It is said in many cases that primarily the mortgage is a charge upon the land, but it would be more accurate to say that it is made primarily a charge upon the purchase money reserved by the grantee to pay it. Thayer v. Torrey, 37 N. J. Law, 339. The relation of the parties, and the nature of the contract, are the same as if the entire consideration had been paid to the grantor, and he had then taken a part of the money sufficient to pay the mortgage, and had intrusted it to the grantee upon his promise to carry it to the mortgagee, and pay it over in satisfaction of the mortgage. Performance of the promise would cancel the mortgage, and leave the estate discharged from the lien. If, as a part of the contract, another portion of the consideration had been paid by giving a second mortgage on the property, the discharge of the first mortgage by payment of the money as agreed might be a very important part of the arrangement, without which the second mortgage would be valueless. In assuming the mortgage the grantee not only undertakes to relieve the mortgagor for personal liability for the debt, but from all liability under the mortgage. If the mortgagor were released from the debt, while the mortgage was allowed to remain a binding contract, enforceable against the land, he would still be liable on the covenants and agreements contained in the mortgage. The implied contract would not be performed so long as the mortgage was outstanding as a valid instrument, upon which the mortgagor could in any form be liable. None of the cases which have come to our attention imply that the payment to be made by a grantee in such a case is anything less than an ordinary payment, which works a complete discharge of the mortgage. The reasoning upon which it is held that the damage to be recovered for a breach of such a contract is the amount of the mortgage debt, if no part of it has been paid, and the authorities cited in support of that doctrine rest upon the ground that an absolute payment should be made; and, where there is an express agreement to pay, the word "pay" is used in its usual sense. Braman v. Dowse, 12 Cush. 227; Furnas v. Durgin, 119 Mass. 500; Locke v. Homer, 131 Mass. 93, and cases cited. It follows that, in an ordinary case of this kind, if a grantee who has assumed a mortgage should procure from the mortgagee a discharge of the mortgagor from personal liability upon the debt, and leave the mortgage still in force, he could be sued by his grantor for a breach of his contract; and nominal damage could be recovered, if no actual damage was shown. If the grantor had such an interest in the property covered by the mortgage as to be actually damnified by the failure to remove the mortgage, he might recover his actual damages, notwithstanding that he had been relieved from personal liability upon the debt. In the case at bar the plaintiff suffered no actual damage by reason of his liability upon the debt, for that was paid by a sale of the mortgaged premises; but under the second mortgage, he had security on the property for his liability named in that, and he was interested in having the first mortgage satisfied and discharged for the improvement of his security. As a direct result of the breach of the contract, he was deprived of that security. The damage which he has suffered is not too remote, but must be presumed to have been contemplated by the parties when they made their contract.

The only remaining objection to his recovery of this damage is that it is uncertain whether he will ever be required to pay the debt covered by the second mortgage. But there is much authority for holding that this fact can make no difference in favor of one who has failed to perform his contract. The defendant should have paid a sum of money which would have given the plaintiff perfect security for the payment by the defendant of the debt upon which the plaintiff is liable. The plaintiff's cause of action for this breach has already accrued. There can be but one recovery upon it, and all his damages must be assessed now. He was entitled to a security which would have been perfect for the amount of the debt. Through the defendant's fault he has no security. His damage is the value of the security which he should have had up to, and not exceeding, the amount of the debt secured. Lethbridge v. Mytton, 2 Barn. & Adol. 772; Brown v. Howard, 2 Brod. & B. 73; Howell v. Young, 5 Barn. & C. 259; Loosemore v. Radford, 9 Mees. & W. 657; Lathrop v. Atwood, 21 Conn. 117; Port v. Jackson, 17 Johns. 239; *Ex parte* Negus, 7 Wend. 499; Crofoot v. Moore, 4 Vt. 204; Wilson v. Stillwell, 9 Ohio St. 467; Stout v. Folger, 34 Iowa, 71; Ham v. Hill, 29 Mo. 275; Locke v. Homer, 131 Mass. 93.

The principle involved is the same as that in Furnas v. Durgin, 119 Mass. 500, and other similar cases.

Three of the judges of the court dissent from the conclusion of the majority in a very vigorous opinion.

CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The cases of *Ex parte* Ulrich, 42 Fed. Rep. 285, in the United States Circuit Court, Western District of Missouri, and People v. Ross, 24 Pac. Rep. 789, decided by the Supreme Court of California, upon a hasty examination, appear to be in conflict. The question in each case was as to the effect of a discharge of the jury without the consent of the defendant, and after trial begun, as constituting jeopardy. The California court held

that such did not constitute jeopardy, or an acquittal of the defendant of the crime for which he was on trial, citing as authority People v. Olcott, 2 Johns. Cas 301, where it was held that where a juror becomes mentally disabled by sickness or intoxication, it is proper to discharge the jury. In the federal court case, Judge Phillips held that where after a person has pleaded not guilty, and when put on trial for a felony and evidence has been introduced, the State adjourns the case to take up the trial of another one for that day and on the adjournment day, on the ground that he is unwell, discharges the jury without the prisoner's consent, the discharge is equivalent to an acquittal. It will be noted, however, that in the California case the discharge of the jury was on account of the sickness of one of the jurors. In the Ulrich case, however, the discharge after one or two days' adjournment was made on account of the temporary illness of the judge, and the decision of the court was upon the distinct ground that where the jury, after the commencement of a trial, has been discharged, not through absolute necessity either physical or legal, such discharge has the same effect as a verdict of acquittal; but that where such discharge has been made with the consent of the prisoner, or is demanded by some overwhelming necessity (as in the California case mentioned above), the discharge is in law tantamount to an acquittal. (Citing Pizano v. State, 54 Amer. Rep. 511; Hilands v. Com., 56 Amer. Rep. 236; State v. Calendin, 8 Iowa, 292; Wright v. State, 5 Ind. 292; Mitchell v. State, 42 Ohio St. 383; Whitten v. State, 61 Miss. 717; McFadden v. Com., 23 Pa. St. 12). The court further held that Const. Mo., § 23 of the bill of rights, providing that "no person, after having once been acquitted by a jury," shall again be put in jeopardy; but if the jury "fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury and commit the prisoner for trial at the next term of the court," does not give the court a right to commit a prisoner for a second trial after discharging the jury without legal cause. In the Ulrich case, after the discharge of the jury, the court at a later date proceeded to try the prisoner, and the proceeding herein noted was an application for a writ of *habeas corpus*, and the question was also very ably considered by Judge Phillips as to how far such action of the State judge constituted an infringement of the United States constitution. Judge Phillips held that since it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has been tried and acquitted of the same offense is depriving him of his liberty "without due process of law" within the meaning of the constitution of the United States, amendment 14.

CAN COURTS APPOINT ASSISTANT PROSECUTING ATTORNEYS.

The appointment of assistant prosecuting attorneys comes within the inherent powers of the court of the jurisdiction, and is discretionary in its nature. "The appellate courts will not interfere with the reasonable exercise of this discretionary power, although they will review and rebuke an abuse of it."[1]

In Wood v. State,[2] the court say that a prosecuting attorney "may properly ask the court to appoint attorneys to assist him in the prosecution of a man accused of crime, and the court commits no error in granting the request. The law freely accords to the accused the assistance of such counsel as he may desire, and there is no reason why the same privilege should not be accorded to the State."

In Tull v. State,[3] the court say: "The court in which a charge preferred by indictment is pending is in a situation to correctly judge whether the case is one in which the prosecutor's request for professional assistance should be granted or denied. In no other officer or tribunal can the power of determining when assistant counsel shall be called, be more appropriately lodged, than in

[1] Shelton v. State, 1 Stew & P. 208; People v. Blackwell, 27 Cal. 65; State v. Bartlett, 55 Me. 200; Edwards v. State, 47 Miss. 581 State v. Russell, 26 La. Ann. 68; Jarnagin v. State, 10 Yerg. 529; Dukes v. State, 11 Ind. 557; Palin v. State, 14 Neb. 540; Bradshaw v. State, 17 Neb. 147; Schuler v. State, 105 Ind. 298, s. c. 4 N. E. Rep. 870; Rounds v. State, 57 Wis. 45, 6 Crim. Law Mag. 45; Commonwealth v. Knapp, 10 Pick. 478; Commonwealth v. Williams, 2 Cush. 582; State v. Wood, 17 Atl. Rep. 483; State v. Fitzgerald, 49 Ia 260; Siebert v. State, 95 Ind. 471; Hopper v. Commonwealth, 6 Gratt. 684; State v. Wilson, 24 Kan. 189; Wood v. State, 92 Ind. 269; Tull v. State, 99 Ind. 238.

[2] 92 Ind. 269.

[3] 99 Ind. 238.

the court in which the trial takes place. The judge has adequate means of knowledge, and is solemnly charged with the duty of securing justice to the defendant and to the State. Better than any one else is he prepared to intelligently decide the question, for he knows the gravity of the charge, as well as the power and influence of the prisoner's counsel, and knows, too, the need the attorney of the State has, for professional assistance. The court having jurisdiction of felonies is not organized to acquit or to convict persons accused of crime, but to see that, if innocent, they have safe deliverance, and, if guilty, that they be justly punished. It is evident that the duty cannot be efficiently discharged, unless the court is invested with authority to call counsel to the assistance of the prosecutor, when the interests of justice require it."[4]

The interests of public justice require that the representatives of the State shall have power to invoke professional assistance for the prosecuting attorney when occasion demands it. To deny the right of the prosecutor to needed assistance might often lead to the defeat of justice, and the escape of offenders who justly merit punishment. The accused is at liberty to summon to his assistance the most learned lawyers and ablest advocates of the bar, and bare justice requires that the State should be granted a corresponding right to call to the aid of the prosecuting attorney, counsel learned in the law. "The forensic contest should be fought with something like a just equality of opposing forces." Careful as the State is of the rights of those accused of crime, it does not yield the right to fairly oppose the array of talent summoned to the assistance of the accused.

"The people do not surrender the right to employ just means of prosecuting criminals by choosing an officer and charging him with the special duty of prosecuting the pleas of the State. In committing to the prosecuting attorney the duty of prosecuting the violators of law, the community does not avow that it will not employ counsel to assist him when the occasion demands."[5]

In People v. Blackwell,[6] it appears from the record, that the court, by the request of the State's attorney, permitted other counsel to assist him at the trial, but that he (the State's attorney) had the active superintendence and management of the case during the progress of the trial. Whether the State, through him, should be allowed to avail itself of additional professional aid, was a matter addressed to the discretion of the court.[7]

Courts may permit attorneys employed on private account to assist in prosecutions.[8]

In Siebert v. State,[9] an attorney of the bar of the trial court was employed by one of the witnesses for the State, who was the uncle of the prosecuting witness, to prosecute the appellant in this cause, and was permitted by the court, over the appellant's objections, to examine witnesses and make the opening and closing argument, with the consent of the court, the prosecuting attorney assisting in the prosecution of the cause, and being present during the entire time, and in no wise incapacitated to prosecute said cause. And the court, in passing upon this matter, say: "We are of the opinion that the question under consideration must be left to the discretion of the trial court; and that, where the action of the court in this regard is complained of, the complaining party must show by the record, positively and affirmatively, an absolute abuse of such discretion, and that he was injured thereby, before this court will be authorized to review such action."

In Lawrence v. State,[10] the person who is alleged in the information to have been the owner of the house broken and entered, and of property stolen therein, being an attorney-at-law, was permitted to assist the district attorney at the request of that officer. And the court say that his participation in the trial is no cause for reversal.[11]

In Bradshaw v. State,[12] the record shows that before any evidence was introduced the district attorney stated to the court that he desired the assistance of a certain attorney (a member of that bar) in the trial of the cause, on account of the magnitude of the case, and that he had before that time requested his assistance. Defendant objected,

[4] See also State v. Ward, 17 Atl. Rep. 483.
[5] Tull v. State, 99 Ind. 238.
[6] 27 Cal. 65 (1864).
[7] State v. Bartlett, 55 Maine, 200; Jarnagin v. State, 10 Yerg. 529.
[8] State v. Fitzgerald, 49 Ia. 260; State v. Montgomery, 22 N. W. Rep. 639.
[9] 95 Ind. 471.
[10] 50 Wis. 507.
[11] Rounds v. State, 57 Wis. 45; State v. Miller, Vt. Supreme Ct. 1887, unreported.
[12] 17 Nebraska 147; See Palin v. State, 14 Neb. 540.

and stated that the attorney was not a disinterested attorney, and was employed by the friends of the deceased. The trial court allowed the attorney to assist and it was not error.[13]

An assistant prosecuting attorney has no power in the matter of retaining counsel to assist in criminal prosecutions.[14]

The State's attorney being present and not objecting to the assistance of an attorney, is equivalent to a request by the State's attorney and permission by the court that such attorney assist in the prosecution.[15]

Most States have statutes which provide that the State's attorney shall not receive any fee from or in behalf of any prosecutor, and the ground of objection made in many cases to the assistance rendered to the State by attorneys on private account, is that they receive compensation, and therefore are barred by the statute. But the State's attorney has the control and management of the cause, while the attorney appointed to assist is simply that of a person to aid and assist the officer, and has no control over the case.[16]

The statutory restrictions apply to incumbents of the office, and not beyond.

Commonwealth v. Knapp[17] is a case in which Daniel Webster had been engaged to assist in the prosecution. It was a capital case, exciting great interest, and requiring in the investigation great legal knowledge and experience. Objection was made by defendant which was based upon the statute prohibiting the taking of fees. The court say: "We have examined that statute, and we are of opinion that it was not intended to prohibit the appointment of the counselors of this court in aid of the law officers, whenever the circumstances of the case should require the court, in the exercise of a sound discretion, to make such appointment."

Statutes, as a rule, "simply mean that the district attorney shall have the general management and control of all such cases."[18]

In State v. Wilson,[19] the appearance of counsel on behalf of the State, privately employed, was upon the request of the county attorney, and under the employment of the father of the deceased, and by the permission of the court first granted. The cause still remained under the control of the county attorney, and the court say that it can not believe that the intent of the statute was to deprive the county attorney of the assistance offered by parties personally wronged by the crime. "The purpose of a public prosecution is to prevent the use of the criminal law to gratify private malice or accomplish personal gain."

By statute law in Michigan no person or attorney shall be employed as assistant who is interested as attorney or otherwise, in any case involving the same facts or circumstances involved in the criminal action.[20] But when it appears from the return of a justice in a criminal prosecution that he had been instructed by the prosecuting attorney to entertain actions when security for costs had been given, and that he named an attorney to prosecute to whom the people made no objection, and who is not alleged to have acted for a private person, the prosecution by such attorney is not error.[21]

M. W. HOPKINS.

[13] State v. Miller, Vt. Supreme Ct. 1887, unreported; State v. Wood, 17 Atl. Rep. 482; State v. Shinner, 40 N. W. Rep. 144.

[14] People v. Hurst, 41 Mich. 328.

[15] Rounds v. State, 57 Wis. 45.

[16] State v. Bartlett, 55 Maine, 200.

[17] 10 Pick. 478.

[18] People v. Biles, 5 West Coast Rep. 829; People v. Tiercott, 2 West Coast Rep. 490.

[19] 24 Kan. 189.

[20] Laws 1879, page 179; People v. Hendrix, 25 N. W. Rep. 299.

[21] People v. Etter, 4 N. W. Rep. 241; People v. Perriman, 40 N. W. Rep. 425.

LIMITATIONS ON MUNICIPAL TAXATION IN OHIO.

I wish to secure the discussion of a question of more than ordinary interest to the people of municipalities. It involves constitutional questions, conflict of laws, as well as powers heretofore exercised without law in the State of Ohio, at least. The Ohio constitution provides that the General Assembly shall provide for the organization of * * * incorporated villages by general laws, restricting their power of taxation, levying assessments, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers. Again, it provides that no tax shall be levied except in pursuance of law; and every law, imposing a tax shall state distinctly the object of the same, to which only it shall be applied. Under this constitutional power incorporated villages are organized. Another provision of the constitution is that no act shall be passed to take effect upon the approval of any other authority than the general assembly, councils of villages can therefore pass no ordinance not first authorized by the legislature. In section 1692 of the Revised statutes of Ohio, these powers are

explicitly enumerated; and by section 2682, their powers of taxation are expressly limited—for instance, for general purposes to one-half mill; and section 2683, explicitly limits the subjects and amount of levies; and again in 2687, provides that when a greater sum is necessary, the proposition may be submitted to a vote of the electors, and if approved, may be levied, but is again limited beyond which even a vote of the people cannot burden themselves with taxation.

Section 5429 exempts from sale under execution certain corporation property of the corporation. Now what is desired to be known is, under all these limitations of power by the supreme authority in the State, what authority exists in courts and juries to assess damages against villages for the laches of ministerial officers of villages, or the non-performance of public duties, far in excess of the amounts which by law they are otherwise permitted to levy? The law says no more shall be assessed. Courts and juries say they shall! Who must be obeyed? Their oaths compel them to obey the law! A judge on the bench says they shall do far more than the law permits! Here is a conflict. Juries seem to be exercising more powers than constitutions and legislatures authorize. Why are the innocent people of a village to be punished with enormous judgments, simply because officers were negligent in duty, or are supposed to have been so. But granting that they were negligent where's the remedy under existing laws, and in the face of the prohibitions as to taxation? positively without any authority to levy any tax, to pay damages assessed against any village. It may be said that a judgment is a contract, and the constitution declares that the legislature has no power to pass a law in violation of a contract.

"I do not find any demand," says Judge Devens, "founded on the neglect of ministerial officers, engaged as servants in the performance of duties which the State as a sovereign has undertaken to perform, have ever been held to render it liable. Nor does this rest upon the narrow ground that there are no means by which such obligations can be enforced, but on the broader ground that no such obligations arise therefrom. Municipalities * * * are created by the State in order that it may exercise, through them, a part of its power of sovereignty." Justice Miller, in the case of Gibbons v. U. S., 8 Wall. 269, says: "No government has ever held itself liable to individuals for the * * * laches by its officers." Justice Story says "to undertake to do this would involve it in all its operations, in endless embarrassments, difficulties and losses which would be subversive of public integrity," and it does.

Again, Judge Ruger says: "It must be conceded that the State can be made liable for injuries * * * only by force of some positive law assuming such liability." See CENTRAL LAW JOURNAL, Vol. 31, page 265. We argue that if a State cannot be so held, a municipality cannot be, without permission from the State, and then by its assumption of the obligation, which has not only never been done by them, thousands of dollars of costs paid in prosecuting and defending such suits, and we should like to have your journal thoroughly discuss this matter, and see how courts get around these sound principles of law, so as to allow juries to assess thousands of dollars damages for innocent people to pay! We don't believe it is right, and yet we would be glad to learn the truth of the matter.

S. S. BLOOM.

Columbus, Ohio.

BANKS AND BANKING — CHECKS — ASSIGNMENT—PLEADING.

BOETTCHER V. COLORADO NAT. BANK.

Supreme Court of Colorado, June 30, 1890.

1. *Equitable Assignments — Bank Checks.* — The holder or payee of a bank check cannot in his own name maintain an action against the bank upon which it is drawn, unless it has been accepted by the bank, even though at the time of its presentment there were unappropriated funds in its hands belonging to the drawer.

2. *Amendments—Pleading.*—The granting of leave to amend pleadings lies in the discretion of the trial court, and he will be presumed to have properly exercised that discretion. When, after four years of unreasonable delay, unexplained by counsel, leave to amend was applied for and allowed, upon grounds of which the appellate court is not advised, the same will not be held erroneous.

REED, C.: On the 28th day of January, 1878, Shackleton & Brinker were partners engaged in business, and keeping a general account with the appellee, and on that date drew their check payable to appellant five days after date, for $472.49; on January 31st, a second check for $453.25, payable six days after date, and one for $37.63, payable on presentation. The first check matured February 2d, the second check, February 5th, the third, due at sight, was presented February 2d. The checks were deposited by appellant for collection with the Union Bank of Greeley, and were forwarded by that bank to applee. On the 2d day of February there was with appellee, to the credit of Shackleton & Brinker, $371.64, and a further deposit was made of $473. On the 5th of February another deposit of $214.84 was made, making the amount to their credit on that date (after deducting an item of interest due the bank) $1,058.39. On January 31st Mr. Shackleton died, leaving Mr. Brinker surviving partner. The three checks were received by appellee from the Union Bank, the first on January 30th, the second on February 1st the third on February 2d. On

February 2d, when the check of January 28th was due, and the sight check was presented, there was not sufficient money to pay both, and neither was paid, but the checks were retained by the appellee. On the 5th of February, when the other time check became due, there was not sufficient money to pay the three, and none were paid. The checks were returned to the Union Bank, and the bank notified of the death of Mr. Shackleton, but with no statement of want of money to meet them. It had also been ascertained by appellee that the firm of Shackleton & Brinker was insolvent, but this fact was not communicated to the Union Bank at the time of the return of the checks. At the time of the presentation of the checks appellee held a note of Shackleton & Brinker for $1,200 and interest, that matured on February 7th, and on that date the money of Shackleton & Brinker ($1,058.39), standing to their credit in the bank, was applied by the appellee upon the note. On the same day appellant and his attorney presented the checks to appellee, and demanded payment, which was refused; and on the next day, February 8th, Mr. Brinker, by a written instrument, assigned to appellant all the moneys of Shackleton & Brinker in appellee bank. The assignment was presented to appellee, payment of the money demanded and refused, and suit was afterwards instituted upon the checks by appellant, resulting in a judgment in his favor. An appeal was taken to this court, and the judgment reversed. See Bank v. Boettcher, 5 Colo. 185, where this court held—First, that "the holder or payee of the check cannot in his own name maintain an action against the drawee, unless the check had been accepted;" second, that, "to warrant the inference of acceptance from conduct, * * * that the circumstances must clearly indicate such an intention on the part of the drawee;" third, that "mere detention does not constitute an implied acceptance and conditional acceptance is not enforceable until complete fulfillment of the condition." The opinion of the court closes as follows: "We are of opinion that the judgment cannot be sustained on the ground of an implied promise, on the present testimony either upon the authority cited or upon principle. As further testimony affecting the conduct of the appellee may be produced upon another trial, the judgment will be reversed, and cause remanded."

Three or four years afterwards, the complaint was amended by adding to each of the original statements of the cause of action, the words "that the said defendant, with intent to accept said checks and pay the same out of the moneys so deposited, detained said checks until February 5, A. D. 1878;" and a fifth and additional count or statement of the cause of action was added, in which, after stating the facts of the case as above, it is alleged, in effect, that Shackleton & Brinker were millers, and purchased large quantities of wheat from appellant to be made into flour, the wheat to be paid for from the proceeds of the flour, and that they made the checks, against such proceeds; that appellee at first, intending to pay the checks, kept them until February 5th; that appellee owned and held a certain promissory note of Shackleton & Brinker which was about to mature; that Shackelton & Brinker and also Brinker, were insolvent, which fact was known to appellee, and that it also knew appellant was not informed of the fact; that appellee, with the intention of applying the money in its possession to the payment of the note and defraud the plaintiff, detained the checks until February 5th, and then returned them, with directions to correspond with Shackleton & Brinker, without giving any information in regard to the insolvency of the firm, or the existence of the promissory note; that the moneys held by appellee were the proceeds of the wheat sold by appellant to Shackleton & Brinker, and were deposited for the payment of the checks, and for no other purpose; that all the moneys, by reason of the premises, were in equity appropriated to the payment of the checks, and were held by the bank in trust for that purpose; paying judgment for the sum of $1,363.36, with interest, "or, if it shall appear the said checks are not accepted, that an account be taken of the moneys in the hands of the defendant liable for the payment of the sum, and for a decree that plaintiff is entitled in equity to have the moneys to the amount of the checks, to be applied to the payment thereof."

The appellee moved the court to strike out the new statement or count; which motion was sustained, and the clause stricken out. The answer to the remaining complaint was full and complete. Trial was had to a jury upon the issue under the pleadings, the facts established, in the judgment of the court, being substantially the same as upon the former trial. At the close of the testimony the court in accordance with the opinion of this court, ordered a verdict for the defendant (appellee). So far as the question presented on this appeal were involved in and determined upon the former appeal, that case must be considered as conclusive of this. The question had not previously been settled judicially in this State; the decisions in other courts were conflicting; the questions were carefully considered; the conclusions reached were based upon the decisions of the federal courts and those of several important commercial States. Where the decisions, especially upon the law of commercial paper are conflicting, it may be considered safe to adopt the conclusions of the federal courts; and it is far better that this branch of the law should be settled definitely than that if be allowed to remain in a fluctuating and uncertain condition.

It will be observed by the language used in the concluding paragraph of the opinion that the cause was remanded to allow further testimony to be introduced in regard to the conduct of appellee in the premises. After an unreasonable delay of three or four years, unexplained, counsel applied for leave to amend the complaint, which

appears to have been granted, though upon what grounds we are not advised. The granting of leave to amend pleadings being however under our practice, so greatly in the discretion of the court, it will be presumed the discretion was properly exercised. The additions made to the original statements of the supposed cause of action may be considered as legitimate amendments. But the question presented for determination in this case is, did the court err in striking out the fifth count or statement, which purported to be entirely new? It is contended in argument that the matter set up in the new count was a new, separate, and distinct cause of action; that it could not be added to or substituted for the other cause of action, at this stage of the proceedings, under our system of practice. The original cause of of action was purely legal. An attempt was made in this count to procure purely equitable relief; but whether it was a proper amendment we do not think it necessary to now determine. True, the motion to strike was based upon the fact that it was not an amendment, but a new and different cause of action; but the action of the court was not necessarily confined to the cause assigned in the motion. If it was insufficient, did not contain facts sufficient to constitute a cause of action, was lacking in essential allegations, the court was warranted in disregarding it. In it the chancery powers of the court were invoked, and it was asked to find and declare the bank to be a trustee, to administer a specific trust for the benefit of the appellant. The equitable case attempted to be made by this count falls far short for want of the material allegations necessary to constitute the appellee a trustee. Admitting the course of business between appellant and Shackleton & Brinker to have been as stated, and appellant by the course of trade or by an agreement equitably entitled to the proceeds of the wheat for its payment, such fact could not affect appellee unless it was a party to such contract, or at least had knowledge of it. Appellee could only be made liable in equity, as trustee, by the allegation and proof of a contract creating a trust to which it was a party, or which, after due notice of its trusteeship, it failed to repudiate. 3 Pom. Eq. Jur. §§ 1237, 1284. Harrison v. Wright, 100 Ind. 524; Hopkinson v. Forster, L. R. 19 Eq. 74; Creveling v. Bank, 46 N. J. Law, 255; Chapman v. White, 6 N. Y. 417; Rosenthal v. Bank, 17 Blatchf. 318.

The paragraph stricken out contained no allegation that appellee was a party to any such contract, or even knew of such a course of business, or the arrangement or equities alleged to have existed between appellant and Shackleton & Brinker, or knew that the money deposited by Shackleton & Brinker was the proceeds of flour made from the wheat furnished by appellant. The deposit by Shackleton & Brinker was a general deposit to their credit. To constitute it a trust fund for the purpose indicated, it should either by express agreement, or by circumstances indicative of the intent to make it such, have been given the character of a special deposit. "The simple deposit of money on account is a general deposit, and transfers the ownership of the money to the bank. The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing moneys by the customer from time to time, is simply that of debtor and creditor, at common law. * * * So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank; it enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a debt owing him from the bank—a chose in action—not any specific money, or a right to any specific money." 2 Morse, Bank, § 568; Marine Bank v. Fulton Bank, 2 Wall. 252; Thompson v. Riggs, 5 Wall. 663; Bank v. Millard, 10 Wall. 152; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82; Carr v. Bank, 107 Mass. 45; Dana v. Bank, 95 Mass. 445. "A deposit is not special unless made so by agreement or directions of the depositor, or by such circumstances as being inclosed in a box, or other matter indicative of intent not to make a general deposit, or unless made in a particular capacity which indicates such intent." 2 Morse, Bank, § 568*b*; Brahm v. Adkins, 77 Ill. 263; Neely v. Rood, 54 Mich. 134, 19 N. W. Rep. 920. It is the more common practice to challenge such defects by demurrer, but legislative authority to do so by motion is not wanting. Section 60, Civil Code. And, under all the circumstances of this case, we do not feel justified in disturbing the action of the court below.

It has already been found by this court that the detention of the checks by appellee did not of itself amount to an acceptance. It has frequently been held, both in England and the United States that, without an acceptance or specific promise to pay, there was no privity between the payee and the bank, so that the former could maintain a suit against the latter, and the rule is the same in equity as at law. Foley v. Hill, 2 H. L. Cas. 28; Creveling v. Bank, *supra;* Bank v. Millard *supra;* Attorney General v. Insurance Co., 71 N. Y. 325; Christmas v. Russell, 14 Wall. 84; Lunt v. Bank, 49 Barb. 227; Loyd v. McCaffery, 46 Pa. St. 410; Ætna Nat. Bank v. Fourth Nat. Bank, *supra*. We advise that the judgment of the district court be affirmed.

ELLIOTT, J. (*dissenting*): Upon the second trial of this cause at *nisi prius* I endeavored to follow the opinion of this court reversing the first judgment, as reported in 5 Colo. 185. It is a familiar rule that on this appeal such former opinion is to be regarded as the law governing the case, so far as the matters involved in the litigation remain unexchanged. Lee v. Stahl, 13 Colo. 174, 22 Pac. Rep. 436. If on this appeal, the court had affirmed the last judgment of the district court simply upon the ground of following "the law of the case," I should have refrained

altogether from participating in the decision; but I feel constrained to dissent from a general reaffirmance of the doctrine announced (Bank v. Boettcher, 5 Colo., *supra*), because the same appears manifestly at variance with the decision of this court in Lehow v. Simonton, 3 Colo. 346, and contrary to sound principles and the better authorities relating to the obligation of banks to pay the checks of their depositors. The opinion in Lehow v. Simonton declares, in effect, that, where two parties enter into a simple contract for the benefit of a third, the third party, though a stranger to the consideration, may maintain an action for a breach of such contract, notwithstanding there may be want of privity between himself and the promisor. As the arrangement between a bank and its depositor is a matter of simple contract, the Lehow-Simonton Case would seem to be a complete answer to the objection that there is a want of privity between the check-holder and the bank, as stated in Bank v. Millard, 10 Wall. 152. But I must not be understood as conceding that there is a want of privity between the bank and *bona fide* check-holders upon presentation of their checks for payment in the usual course of business. According to the system of modern banking, when a general deposit is made, the implied, if not the express, promise by the bank to the depositor is that the bank will pay the depositor's checks, in sums to suit his convenience in the order of their presentation, to the extent of the deposit; and this promise is held out to the community as an inducement to patronage and public confidence, for the benefit of all who have occasion to receive the checks of the depositor in the usual course of business. Hence when a bank, having sufficient funds of a depositor to pay his checks, refuses to make such payment upon proper presentation, it would seem that the check-holder must have a right of action directly against the bank for the violation of the promise made for his benefit. The reasons in support of this view are numerous and most convincing. I shall not undertake to elaborate them, preferring, under the circumstances in which this opinion is prepared, to quote from standard authorities and cite leading judicial decisions in support of the view announced in this opinion.

In Daniel on Negotiable Instruments (volume 2, p. 653 *et seq.*) we find the following; "The objection to the check-holder's suing the bank, on the ground that there is no privity between him and the bank, seems to us utterly untenable. It is true there is no privity before the presentment of the check, but by that very act they are brought in privity, and the check-holder's right to sue the bank completed. The sole motive often, if not generally, inducing the depositor to place his funds in bank, is the desire to have them in safety where they may be checked on at convenience. The bank receives its reward in the use of the money and in the business attracted in checking it out; and it is the universal understanding between banks and depositors, arising from the customs of trade, that the check of the latter is to be paid upon presentment. The United States Supreme Court so declares in a recent opinion, though as yet it has not followed that declaration to its logical sequence. The drawer of the check makes the deposit, and draws the check with this understanding. The bank receives the money with the like understanding, and so the holder receives the check; and the mutual understanding of the parties, although they have not individually concerted together, creates an implied privity, and completes the contract between them. * * * As an acceptance of a bill may be implied, so may the acceptance of a check; and as a promise to accept will operate as an acceptance to the holder who takes a bill on the faith thereof, so should it be as to a check. Now, by the very act of drawing a check, the drawer communicates to the payee the fact that the bank holds that amount to his credit which it has agreed to pay on his check. By receiving the deposit, the bank has impliedly so agreed; and the holder receiving the check in reliance on this condition of things should be sustained, provided the drawer has not deceived him by drawing without funds to meet the check. * * * It is no answer to these views to say that the holder of a bill cannot sue the drawee unless it be accepted. The drawee of a bill does not receive money to be paid out on checks. And the distinction between the bank or banker on whom the check is drawn and the ordinary drawee of a bill is the very gist of the distinction between the rights of the holders of the different instruments."

In Morse on Banks and Banking (3d ed. § 493 *et seq.*) the learned author says: "The most numerous body of decisions sustains the view that a check is neither a legal or an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank. * * * Another class of cases affirm that a check is an assignment as between drawer and payee, * * * and that, upon presentment, the bank is brought into privity with the holder, and is liable to him for improper refusal to pay. * * * Upon this side we find a goodly array of authorities, and all the advanced, clear, independent thought and reasoning. * The plain common sense of the holder's rights would seem to be * * that, as between the bank and the holder, presentment for payment works a transfer of the fund. If the unincumbered funds in its possession are sufficient, and this fact is within the knowledge attainable by the bank with reasonable diligence, it is the duty of the bank to pay the check. It is bad faith on its part, or negligence, not to do it, and the check-holder is directly injured by its wrongful conduct. What more does the law require as the basis for a right of action? * * * Legal analogies are plenty and forcible. B. writes: 'I promise to pay D. or order $100 on demand.' D. orders the money paid to H. It is perfectly clear that H. can sue B. if he refuses to pay according to his promise.

B. has in fact promised to pay H. for he engaged to pay to whomsoever D. should order, and H. is D.'s order. Now, a bank receiving $100 on general deposit impliedly promises (by the universal understanding of trade, as ascertained in innumerable and unbroken decisions) to pay that money to the depositor, or such persons, and in such amounts, as he may order. Where, then, is the difference between the position of the holder of a check and the indorsee of a note? The amount is fixed in the note from the start. In the check, however, B. only says you must not go beyond your deposit, but you may fill in the check for a less amount if you wish, and I will pay it. That is a promise to pay the amount of a properly drawn check, just as truly as a note is a promise to pay the amount named in it. As soon as the check is drawn and presented, the promise takes effect on the definite amount. The only other difference is that one promise is in writing, and the other verbal or tacit; but this can make no substantial difference, except as opening the door to the fraud of a depositor who draws more than one check against the same money; and this can never affect the bank, as its promise and duty are only to pay checks as they are presented. It is a general rule of law that, if a promise is made by B. to D. for the benefit of H. the latter can sue B. for the breach. From this principle also ressults, as a corollary, the right of a check-holder to sue the bank. Suppose the drawer fails after the bank's refusal to pay the holder, and he loses half the amount of it, or suppose, after refusal, the drawer checks out the money himself, and absconds, or is found to be utterly worthless; the holder loses the whole value of the check by reason of conduct on the part of the bank which all the cases agree in condemning as wrongful and contrary to its duty. What must we think of a system of law that claims as one of its fundamental maxims: 'Wherever there is a right there is a remedy,' and proclaims that for every injury the law will give redress, and yet denies the right of the check-holder to sue the drawee? We hope that it will not be many years before it will cease to be possible to find this blot on the common law. No amount of deciding in the United States Supreme Court, nor in any other chamber of wisdom, can make the unjust just; and as surely, as the Dred Scott decision is dead, so surely will the decision in National Bank of the Republic v. Millard die with the judges who rendered it." See notes and cases cited by the author in connection with the foregoing.

In Story on Promissory Notes (section 489) the eminent author says: "Checks have many resemblances to bills of exchange, and are, in many respects, governed by the same rules and principles as the latter. But *nullum simile est idem;* and their nature, obligation, and character are in some respects different from those of common bills of exchange. The circumstances in which they principally differ from bills of exchange, or at least from bills of exchange in ordinary use and circulation, are: (1) They are always drawn on a bank or on bankers, and are payable immediately on presentment, without any days of grace. (2) They require no acceptance, as distinct from prompt payment. (3) They are always supposed to be drawn upon a previous deposit of funds, and are an absolute appropriation of so much money in the hands of the bank or bankers to the holder of the check."

Mr. Justice Sharswood of the Supreme Court of Pennsylvania, in his notes to Byles on Bills (pages 21, 22), says: "A bill of exchange is not an equitable assignment or appropriation, but the cases treat a check on a banker as such; and if the holder is a holder for value, as to whom the drawer cannot revoke rightfully the power which he holds, coupled with an interest, why should not the banker, upon distinct claim and notice, be held bound by the equity?"

The views of the text-writers as above stated are based upon strong and well-reasoned opinion from the highest courts of several States, squarely and emphatically declaring the liability of banks and bankers to the *bona fide* check-holders of their depositors. Munn v. Burch, 25 Ill. 35; Roberts v. Austin, 26 Iowa, 323; Lester v. Given, 8 Bush, 357; and Fogarties v. Bank, 12 Rich. Law 518—are leading cases upon the question. Other decisions, tending in the same direction, are referred to in the notes to Daniel's and Morse's works, *supra*. It is not my purpose on this occasion to attempt a citation and analysis of the many authorities bearing upon this question. From the weight and strength of the authorities already quoted, it will readily be perceived why I cannot approve the doctrine that banks and bankers may wrongfully refuse to pay their depositors' checks without incurring any liability to *bona fide* check-holders. Hence I regret that certain portions of the opinion prepared by Mr. Commissioner Reed should have been promulgated without a thorough re-examination of the question. It seems to me exceedingly unfortunate that the opinions of this court should be arrayed on the wrong side of such an important question of commercial law. It is most desirable that upon this question, as upon others, our decisions should be ranked with those of "advanced, clear, independent thought and reasoning."

NOTE.—This case brings up the old but very important question, whether or not the *bona fide* holder of a bank check, in case of refusal to pay, may, in his own name, sue the bank. To the writer there has always seemed to be but one answer to this question, and that is that such action may be maintained. He knows that the weight of authority is against this view. But we should remember that there was a time when the *weight of authority* was against views which are now regarded as containing principles of the soundest doctrines of public policy, and are demanded by the very best interests of the mercantile world and the welfare of humanity in general. Law is a progressive science. The enforcement of the iron-clad rules of a century ago would paralyze the world of

to-day. How the old moss-backs raised their hands in holy horror at the innovations made by the gifted Mansfield. Yet they are forgotten, and their beloved *precedents* are only known by a research through musty old reports, while he is revered and remembered as the great father of commercial law, whose doctrines are still the living law of the land. Law is, or should be, common sense; and precedents should receive that consideration which is due to the high character and scholarly attainments of those who gave them. But they should also be considered in the light of their surroundings at the time they were first promulgated. If found to clash with the *common-sense view*, or impair the business world, or impede the progress of humanity, the judge should look for new landmarks more in consonance with the times in which he lives. Why should the holder of a check not be permitted to sue the bank? Who can read and not believe that the opinion of the dissenting judge contains the correct exposition of the law? What reason is suggested by the ordinary usages of the business world? Perhaps the ablest decision, and among the earliest in accordance with the dissenting judge's view, is that of Munn v. Birch,[1] where it was held "that such customs as are known to be general, long-established and well understood, and acted upon in the commercial world, *enter into* and form a part of every contract to which they apply, though not mentioned or alluded to; if such is the custom of the bankers to allow depositors to check out funds in parcels. According to universal custom the banker, when he receives a deposit, agrees with the depositor to pay it out on the presentation of his checks in such sums as they may call for, and to the persons presenting them, and such an agreement will be implied in favor of the holder of such checks. The delivery of a check by a depositor upon his banker for value operates to transfer to the holder the legal title to so much of the deposit as the check calls for, and the banker, on its presentation, becomes liable to its owner, if he has funds of the drawer sufficient to meet the same. If the drawer of the bank check has at the time of presentation funds on deposit subject to draft sufficient to pay it, the rights of the parties will be *fixed*, and the banker will have no right afterwards to pay other checks or demands, either to himself or others, subsequently presented or accrued." This decision has been several times affirmed,[2] in one of which decsions of affirmation C. J. Caton said: "The decision of Munn v. Birch was not made till after the most mature investigation. We have re-examined what we then said and are but confirmed in the correctness of the principles there laid down." Upon this side of the question the dissenting opinion of Judge Abbott, in National Bank v. Eliot Bank,[3] is very able and thorough where he arrives at the conclusion that for two well-known reasons should the holder have his action against the bank: *First*, the contract of the banker with his customer who deposits money with him, that he will pay it upon written checks of the depositor, or to the persons who shall present them; and *second*, the well-established principle of law, that whenever one promises another that he will pay money or do an act for the benefit of a third person, the third person may sue in his own name, although no consideration moved from him and no contract was made between him and the person sued. The superior court of Cincinnati, an inferior court of Ohio, but presided over by some eminent lawyers, has squarely decided this question. Here Judge Storer says: "In thus deciding, we feel satisfied we violate *no legal principle*, overrule no reported decision of our own supreme court, and establish no new or unreasonable rule. On the contrary, we merely give the full benefit of the *contract* to the party who is alone entitled to claim the fund represented by the check. We thus maintain the doctrine of equitable assignment in its true spirit, without refining away by technical niceties, or the dread of supposed innovations, the rights of the parties—securing the substance without grasping only at the shadow."[4] The vigorous language of Morse in his admirable work on Banks and Banking, as quoted in the dissenting opinion, is none too strong. The only wonder is that in the face of such reasoning, courts will still blindly follow precedent and render decisions which are at variance with all usage, and opposite to all ideas of just and right as believed and maintained by the business world. Bank checks furnish a large part of our circulating medium for the transaction of business. Without them, the volume of our currency would need a large addition. What business is there in which they do not largely supply the place of money? What business man is there that does not keep and use a check book? What is the bargain with the banker when he makes his deposit? Is it to pay him back in bulk? Is it to pay him personally? Is it not to pay it out upon presentation of checks in such sums and to such persons as the depositor may designate? Let a banker refuse to make such contract, *either express or implied*, and see how much patronage he will have. In a few weeks there would be one bank without a single business man for a depositor.

When I receive a bank check, the owner of the fund upon which it is drawn absolutely appropriates to my use the amount thereof as designated by the check, and if sufficient is in the hands of the banker, *unappropriated* at the time of its presentation, the banker must pay it. Until the check is presented, although given, the fund remains at the disposal and under the control of the depositor. He may countermand the check or appropriate it elsewhere.

The writer is of the decided opinion that the decision of the majority of the court on the question in the principal case is *wrong upon every ground upon which it might be sought to be maintained*, and most cordially approves the vigorous language of the dissenting judge. Two very interesting and able articles will be found upon this subject in former numbers of the JOURNAL.[5]

WM. M. ROCKEL.

[1] 25 Ill. 35.

[2] Insurance Co. v. Stanford, 28 Ill. 168; Bank v. Bank, 80 Ill. 212.

[3] 5 Am. Law Reg. (1856) 711.

[4] McGreiger v. Loomis, 1 Disney, 548.

[5] 11 Cent. L. J. 381; 16 Cent. L. J. 266.

CORRESPONDENCE.

MULTIPLICITY OF REPORTS.

To the Editor of the Central Law Journal:

I want to add my commendation of your position in regard to the increasing multiplicity of reports, and to express the hope that you will keep up the fight on this line until some change is made. You could accomplish no greater good to the bar than by whittling down these endless opinions. It seems that in these latter days, every man who gets on the bench of an appellate court begins at once to imagine that he is an

Eldon, a Mansfield or a Marshall, and straightway proceeds to demonstrate in the most voluminous and untiring manner, and to the thorough satisfaction of every one who has occasion to use the reports, that he is nothing of the kind. In view of the condition of the docket in most of these courts, and considering that a long delay is often virtually a denial of justice, it must occur that the time wasted by the judges in writing these useless opinions is as great a loss as is that spent by the lawyers in reading them. Blessed is the judge who writes short opinions, for his fame shall be great among lawyers.

ED. G. TAYLOR.

Kansas City, Oct. 11, 1890.

JETSAM AND FLOTSAM.

MEETING OF AMERICAN BAR ASSOCIATION.—The meeting of the American Bar Association at Saratoga, August 20-22, was a noteworthy gathering of notable members of the profession from all parts of the Union. The exercises were interesting, and the annual address by James C. Carter, of New York, on "The Ideal and the Actual in Law," was a most finished and scholarly production. The usual number of papers on legal subjects were read; the most important, perhaps being that of Henry C. Tompkins, of Alabama, on "The Necessity for Uniformity in the Law governing Commercial Paper."

The election of Prof. Simeon E. Baldwin of New Haven, as President for the ensuing year, was a well deserved compliment bestowed upon a most worthy and accomplished scholar and lawyer.

If is often said that the American Bar Association does not accomplish anything. It may be to a certain extent true that the visible results of its deliberations have not been marked; but these annual reunions of lawyers from the several States cannot fail to bind the profession together by stronger ties, and the earnest discussion of needed legal reforms, while it may not bear immediate fruit, must ultimately bring about the desired end. The American Bar Association may move slowly, but its work will tell in time.

The next annual meeting of the Association will be held in Boston, and the "Hub" will do its utmost to make the gathering a memorable one.—*The Green Bag.*

LAWYER'S SUMMER BOOM.—A few days since a famous lawyer sat in his shirt sleeves in his inner office, with his feet on a window sill and a cigar in the corner of his mouth, at half past ten in the morning. People came to see him at short intervals and they were all told that he was engaged at an important conference uptown, but that he would be at the office between twelve and one. At twelve o'clock the lawyer had finished his cigars, got through with the papers, and narrowly escaped falling asleep half a dozen times.

At the stroke of the clock a remarkable change came over him. He pulled on an alapaca coat, brushed his hair back from the bulging forehead, buttoned the coat up severely to the neck, and sat down in his consulting room, surrounded by ponderous tomes and legal documents. All the people who had been to see him that day crowded into the office at twelve o'clock and patiently waited for a chance to speak to the great man. All were impressed by the tremendous rush of business in hand. The outer room was crowded to suffocation. At one o'clock the last of the callers had been disposed of and the statement went forth that the lawyer could see no one else until twelve o'clock he next day.—*Blakely Hall's New York Letter.*

HUMORS OF THE LAW.

Magistrate—"Were you prisint whin the assault was committed on ye?" Witness—May it please the coort, I had jist got there."

Judge—"This gentleman can identify the watch, because his initials are scratched on the inside of the case." Prisoner—"No, he can't; I scratched them off."

"Kin I do anything wid a pusson who calls me a thief?" he asked as he stopped a patrolman on Main street the other day.

"I am afraid not."

"But hain't dat agin my character?"

"Yes; but suppose you went to law, and the other party should come into court with the feather?"

"What feathers?"

"Chicken."

"H'm! I see! I reckon I hadn't better pay any 'tension to dat pusson's remarks. He doan' dun amount to nothin' anyhow."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Decedent's Land.—Under Code Ala. 1886, § 2104, providing that an intestate's land may

be sold by the administrator for the payment of debts, where the personal estate is insufficient therefor, and section 2106, providing that the administrator shall make application to the probate court for such sale, a decree for the sale of lands, rendered on a petition of the administrator alleging that the personal property is insufficient to pay the debts, without any averment that there are debts, is void, even on collateral attack.—*Abernathy v. O'Reilly*, Ala., 7 South. Rep. 919.

2. ADMINISTRATOR'S SALE TO PAY DEBTS.—The defect in a petition to sell land to pay debts, in not showing whether it was separate or community property, is cured by stating the fact in the order of sale.—*In re Estate of Arguello*, Cal., 24 Pac. Rep. 641.

3. ADMIRALTY—Collision.—A schooner at anchor hoisted her sails in order to assist in loosening the anchor. When the anchor broke from the bottom, the schooner started with the master alone on deck, the entire crew being engaged at the windlass, and collided with another vessel lying at anchor a third of a mile to leeward. The evidence showed that the master of the schooner could have avoided the collision by putting his wheel hard to port: *Held*, that the schooner was responsible for the collision.—*Comerford v. The Melvina*, U. S. D. C. (Ill.), 42 Fed. Rep. 77.

4. ADMIRALTY—Decree Pro Confesso.—A decree *pro confesso* in admiralty is not final, and merely authorizes the court to hear the case *ex parte*, either directly, or by reference to a commissioner to ascertain and report the amount due.—*The Lopez*, U. S. D. C. (Ala.), 42 Fed. Rep. 95.

5. ADMIRALTY—Judgment In Rem.—Where owners of a vessel brought suit *in rem* against a steam-ship, alleging that the steam-ship had negligently collided with and sunk their vessel, and on the trial the court found that there had been no collision between those two vessels, which decision was affirmed by the appellate court, and subsequently the owners, joining with themselves an insurance company, brought suit against the master of the steam-ship to recover the same damages, nearly six years after the alleged collision, *Held*, that the question of the negligence of the master was *res adjudicata*, and that the suit should not be entertained.—*Bailey v. Sundberg*, U. S. D. C. (N. Y.), 42 Fed. Rep. 81.

6. ADMIRALTY—Lien.—One who is engaged and ships as pilot of a vessel, whereon another stands as registered master, has a lien on the boat for his wages, although he may be in entire charge of her navigation.—*The Atlas*, U. S. D. C. (N. Y.), 42 Fed. Rep. 793.

7. ADMIRALTY—Obstruction to Navigation.—A telegraph company, whose submarine cables are laid in the soft mud or silt at the bottom of a navigable river, in such a manner as to interfere with vessels, which are accustomed to plow through the mud in their movements about the docks, thereby obstructs navigation, contrary to the provisions of Rev. St. U. S. § 5263.—*The City of Richmond*, U. S. D. C. (N. Y.), 42 Fed. Rep. 85.

8. ADMIRALTY—Salvage.—A raft of timber found drifting with the tide on deep water in a harbor, and out of control of the owners, is a subject of salvage.—*Bywater v. A Raft of Piles*, U. S. D. C. (Washington), 42 Fed. Rep. 917.

9. ADMIRALTY—Seamen.—The obligation of a vessel navigating the lakes to support and cure seamen taken sick or receiving injuries in the service of the ship does not extend beyond the termination of the seaman's contract, and his return to his home or to a marine hospital.—*The J. F. Card*, U. S. D. C. (Mich.), 42 Fed. Rep. 92.

10. ADMIRALTY—Shipping.—Glycerine was stowed on a British ship at Genoa, Italy, and brought to this county under a bill of lading, which, besides the ordinary exception of perils of the sea, contained an exception against liability for loss occasioned by leakage or stowage, or by negligence of any person in the service of the ship. The latter exception is valid both by English and Italian law: *Held*, the foreign law governed as to any negligence within the foreign jurisdiction, and whether the damage was occasioned by perils of the sea, or by negligent stowage at Genoa, the libelant could not recover; their being no negligence shown or presumed, in this country, or from acts committed on the high seas.—*The Trinacria*, U. S. D. C. (N. Y.), 42 Fed. Rep. 863.

11. ADMIRALTY—Wharves—Damages.—A wharfinger is not liable for injuries occasioned to a vessel, while mooring, by reason of recent obstructions in the water along-side the dock caused by the sinking of a dredge, when the circumstances are as well known to the agents of the vessel as to the wharfinger, and they, and not the wharfinger, undertake to dock the ship in a manner to avoid the apprehended obstructions.—*The Stroma*, U. S. D. C. (N. Y.), 42 Fed. Rep. 922.

12. ADMIRALTY PRACTICE—Cross-libel.—In a suit for salvage by the crew and owners of a tug for saving a fleet of coal barges which had been loosened from their moorings and scattered by the wind, a counter-claim for the wrongful mooring of the tug to the outer barge of the fleet, whereby the accident occurred which exposed the barges to the danger from which the tug saved them, is not the proper subject of a cross-libel.—*Southwestern Transp. Co. v. Pittsburg Coal Co.*, U. S. D. C. (La.), 42 Fed. Rep. 918.

13. ADVERSE POSSESSION—Admission Against Title.—Though the husband be a drunkard, and the wife support the family by her industry, he still continues the head of the family, and any admission by him as to whether his occupation of land is adverse concludes her right after his death.—*Davis v. Collins*, U. S. C. C. (Ill.), 42 Fed. Rep. 31.

14. ADVERSE POSSESSION—Inclosed and Uninclosed Land.—Defendant with her husband entered on 80 acres of wild timber land. He cleared 60 acres (all that was fit for cultivation), inclosed and cultivated it, using the 20 acres uninclosed for wood, rails, etc. After the husband's death the widow and their children continued to occupy it, and use it in the same manner: *Held*, that having acquired title by adverse possession to the 60 acres, she was also entitled to the 20 acres uninclosed.—*Mississippi County v. Vowles*, Mo., 14 S. W. Rep 282.

15. APPEAL—Erroneous Claim.—Where plaintiff has had judgment for a sum equal to that to which the various items of his claim amount when properly summed up, though by an apparent error in calculation a larger sum is claimed, he has recovered all he is entitled to, and the judgment will not be disturbed on his appeal.—*Becker v. Board County Com'rs*, Mont., 24 Pac. Rep. 700.

16. APPEAL—Justice of the Peace.—Where an appeal is taken from the judgment of a justice, but not within two days, as required by the Tennessee statutes, so that the appellate court acquires no jurisdiction, the proper judgment therein is a "dismissal for want of jurisdiction," and costs, as provided by Mill. & V. Code, § 3940; and section 3861, which provides that "if the appeal is dismissed for any cause the appellee is entitled to an affirmance of the judgment below, with costs," does not apply to such a dismissal.—*Douglass v. Neguelona*, Tenn., 14 S. W. Rep. 283.

17. ASSAULT AND BATTERY—Chastisement of Child.—One standing *in loco parentis* is not criminally liable for punishing a child merely because the punishment be excessive; it must also have been inflicted with legal malice, or there must have been some permanent injury.—*Dean v. State*, Ala., 8 South. Rep. 38.

18. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Plaintiffs, as a partnership, were conducting a mercantile business on the verge of insolvency. Defendant sued out an attachment, which caused plaintiffs to make an assignment for benefit of creditors. They then brought an action for injuries to the firm property and credit resulting from defendant's attachment: *Held*, that they could not maintain the action, as the right passed to the assignee for the benefit of creditors as an asset

of the firm.—*Cleveland Coal Co. v. Sloan*, Ky., 14 S. W. Rep. 279.

19. ASSIGNMENT OF PAY OF ARMY OFFICER.—The assignment of the unearned half-pay of a retired army officer will not be enforced, as being against public policy, he being still subject to military orders under Rev. St. U. S. §§ 1256, 1259, 4816.—*Swenk v. Wyckoff*, N. J., 20 Atl. Rep. 259.

20. ATTACHMENT.—Where the purchaser of land under an attachment afterwards sues in a court of competent jurisdiction to set aside a former deed of the land from the debtor in the attachment suit, as fraudulent, a judgment setting the deed aside is an adjudication of the validity of the writ of attachment, since, if the attachment proceedings had been invalid, the purchaser would have had no right to question the validity of the deed.—*Conklin v. Wehrman*, U. S. C. C. (Iowa), 43 Fed. Rep. 12.

21. ATTACHMENT—Against Partnership.—Where defendants in attachment are described in the affidavit and in the writ as "O & J P, partners under the style of P Bros.," the attachment may be levied either on partnership effects or on the individual property of the members, the obligations of partners under the laws of Alabama being joint and several.—*Dollins v. Pollock*, Ala., 7 South. Rep. 904.

22. ATTACHMENT—Judgment.—In a suit by attachment defendants claimed damages for the wrongful suing out of the writ, and for the conversion of the goods. There was a verdict for defendants for $3,301.77, on which the court entered judgment that defendants recover of plaintiff $3,801.77, and costs, "for which let execution issue;" and "it is further ordered that the clerk of this court deliver over to" defendants "the sum of money deposited in this cause, * * * to-wit, $1,340, being proceeds derived from sale of attached goods:" *Held*, that it was not intended that defendants should have the $1,340 in addition to the amount found by the jury.—*McClelland v. Fallon*, Tex., 14 S. W. Rep. 295.

23. ATTORNEY'S LIEN.—Code Ga. § 1989, provides that "upon all suits for the recovery of real and personal property, and upon all judgments or decrees for the recovery of the same, attorneys at law shall have a lien on the property recovered:" *Held*, that land purchased by a mortgagor in foreclosure proceedings is "recovered" within the meaning of the statute, and that the attorney who conducted the foreclosure has a lien for his services.—*Wooten v. Denmark*, Ga., 11 S. E. Rep. 861.

24. BAILMENT—Confusion of Goods.—In an action to recover the value of goods taken by the creditors, the court held that "the case would fall within the operation of the principle that where a person mingles his goods with those of another, and is unable to distinguish them, the loss must fall upon him," and submitted to the jury merely the question of the value of the whole amount of goods taken: *Held*, that the court should have submitted the question of whether the goods were mixed willfully, fraudulently or wrongfully, as, if they were mixed innocently or by mistake, defendants would be entitled to retain the goods which they could distinguish, or the value thereof, or to show what proportion of value their goods bore to those purchased from the agent.—*Claflin v. Continental Jersey Works*, Ga., 11 S. E. Rep. 721.

25. BANKS AND BANKING—Collections—Payment.—An indorsee for collection for account of a prior indorsee for collection is liable to the owner of the draft for the amount collected, and not remitted to the owner or the prior indorsee, though credit for the amount was given the latter, and he charged the collector and credited the owner, and was charged for the same by the owner, and though the collector, by virtue of an agreement with its indorser, whereby the amount due from one to the other for collections was to be placed to the latter's credit with a certain bank, wrote to that bank to place the amount to the credit of the prior indorsee, which order it could have countermanded after notice of the latter's failure.—*Commercial Nat. Bank v. Hamilton Nat. Bank*, U. S. C. C. (Ind.), 42 Fed. Rep. 880.

26. BILLS OF EXCEPTIONS.—All bills of exceptions certified since January 1, 1890, must conform to the act of November 11, 1889, the prior statutes on the subject having been superseded by that act. Where there has been no compliance, nor attempt to comply, with the provisions of the act, this court will not reverse the judgment complained of.—*Baugh v. State*, Ga., 11 S. E. Rep. 839.

27. BOUNDARIES—Evidence.—In ejectment for land claimed by plaintiff under a patent from the United States the evidence showed that the land in controversy was a strip along the southern part of his grant; that the southern line, as located by a well-known natural monument, which was one of the calls of the survey, included this strip; but that if the southern line was run by course and distance it did not include this strip, which in that case belonged to defendant: *Held*, that the evidence was not sufficient to sustain a judgment for defendant, as the natural monument called for in the survey must prevail over the courses and distances when there is a discrepancy.—*Adair v. White*, Cal., 24 Pac. Rep. 663.

28. CARRIERS—Interstate Commerce.—Where a railroad company which has fixed a rate of 20 cents per hundred for freight from Chicago to New York, and 22 cents per hundred for freight from points west of Chicago to New York, of which latter rate said company received 18 cents, makes an arrangement with a Chicago firm to ship its freight from Chicago to New York at 22 cents under bills of lading purporting to come from western points, and to return to them 4 cents under pretense of paying it to the road bringing the freight into Chicago, it is guilty of a violation of the provision of the interstate commerce act of February 4, 1887, which makes it a misdemeanor for a common carrier to charge different rates from those fixed in its schedule.—*United States v. Michigan Cent. R. Co.*, U. S. D. C. (Ill.), 42 Fed. Rep. 26.

29. CARRIERS OF GOODS—Warehousemen.—A bill of lading of cotton gave the railroad company the privilege of compressing the cotton at its own expense for convenience of carriage, and exempted it from loss by fire while at depots, stations and warehouses: *Held*, that the company was not liable as carrier for loss of the cotton by fire, not caused by negligence, while stored in a warehouse for compression, though the warehouseman had received the cotton as agent of the railroad company.—*Lancaster Mills v. Merchants' Cotton-Press & Storage Co.*, Tenn., 14 S. W. Rep. 317.

30. CARRIERS OF PASSENGERS—Discrimination.—The owner of a bus line, who has made an approach to a depot platform under an oral agreement with the railway company that he should have its exclusive use, cannot confine the teams of a rival line to other parts of the platform, at which the chance of getting passengers is not so good, and to which in dry weather vehicles can be driven or backed up with some difficulty, while in wet weather it is very hard to do so; the agreement to give the exclusive privilege being against public policy, and the spirit of Const. Mo. art. 12, § 23, which prohibits "discrimination in charges or facilities in transportation * * * between transportation companies and individuals, or in favor of either."—*Cravens v. Rodgers*, Mo., 14 S. W. Rep. 106.

31. CARRIERS OF PASSENGERS—Extra Fare.—Where a passenger sought to buy a ticket, but could not, because the agent had left the office, and gone to meet the train, then standing at a water-tank some 206 feet away, and the passenger refused, willfully and captiously, to pay the conductor 25 cents in excess of the regular fare, and take a rebate check, (the requirement of the conductor being in accordance with his instructions, and having the sanction of the railroad commission of the State), and this refusal being persisted in until the train was stopped, the conductor was authorized to put the passenger off the train.—*Harrison v. Fink*, U. S. C. C. (Ga.), 42 Fed. Rep. 787.

32. CARRIERS OF PASSENGERS—Fare.—Before a railroad company can collect excess fare from a passenger who

has not purchased a ticket under the provisions of chapter 139 of the Laws of 1886, it must have a ticket-office open for the sale of tickets at the station where passage is taken at least 30 minutes prior to the departure of the train. A keeping of the office open for 30 minutes prior to the advertised time of departure will not suffice where the train is behind time. If the office is not open, with an agent in the same, ready upon call to sell tickets, long enough before the actual departure of the train, whether delayed or not, to enable passengers to purchase tickets and safely board the train, no excess fare can be collected.—*Atchison, T. & S. F. R. Co. v. Dwelle*, Kan., 24 Pac. Rep. 500.

33. CHATTEL MORTGAGES.—Code Ala. 1886, § 1818, provides that all loans of personal property, not in writing, shall vest an absolute estate in the possessor, after three years, as against purchasers and creditors: *Held*, that a mortgagee is a purchaser within the statute where the mortgagor had been left in possession of a piano by her daughter for more than four years, and had used and mortgaged same as part of the furniture of her boarding-house.—*Carr v. Lester*, Ala., 8 South. Rep. 35.

34. CHATTEL MORTGAGE — Trover.— A mortgagee of chattels in possession, who has sold part for enough to pay the debt, and denies the debtor's title to the rest, is liable in trover without either tender or demand.—*Iler v. Baker*, Mich., 46 N. W. Rep. 377.

35. CONDITIONAL SALES.—A contract of sale, by the terms of which the vendor retains the "right, title and interest" in certain personal property "until sold" by the vendee, is not void as against public policy, and does not vest in the vendee an interest subject to execution.—*Dewes' Brewing Co. v. Merritt*, Mich., 46 N. W. Rep. 379.

36. CONDITIONAL SALE.—Plaintiffs delivered to defendant a piano, she giving her notes "for value received for the rent." Plaintiffs were to retain title till all notes were paid, but upon the payment of said notes "given for the use of this piano" title was to pass to the "lessee." Upon default in payment the piano was to be returned: *Held*, to be a conditional sale, and not a lease, and upon recovery of the piano the money already paid should be returned, after deducting the proper amount for the use of the piano.—*Hayes v. Jordan*, Ga., 11 S. E. Rep. 833.

37. CONDITIONAL SALE.—Where one sells personalty to another for $800, of which $250 is paid down, and it is agreed that title shall not vest in the buyer unless he pays the balance in a given time, the sale is a condi tional one, and where the balance is not paid within the time named or after demand the seller may recover the property from the buyer's mortgagee.—*Shoshonetz v. Campbell*, Utah, 24 Pac. Rep. 672.

38. CONSTITUTIONAL LAW — Adulteration.—The requirement of sections 1 and 2 of that statute that baking powder containing alum be marked so as to show that fact, *held* constitutional, whether or not other sections of the act are constitutional.—*Stolz v. Thompson*, Minn., 46 N. W. Rep. 410.

39. CONSTITUTIONAL LAW—Amendments.—Const. Nev. art. 16, § 1, provides that proposed amendments to the constitution shall be submitted to the people, and that, if "the people shall approve and ratify such * * * amendments by a majority of the electors qualified to vote for members of the legislature voting theron, such * * * amendments shall become a part of the constitution:" *Held*, that the words "voting thereon" refer to "a majority of the electors," and not to "members of the legislature," and hence they do not restrict the right to vote for the approval of the amendments to those electors who voted for the members of the legislature that voted to submit the amendments to the people.—*State v. Board of Examiners*, Nev., 24 Pac. Rep. 614.

40. CONSTITUTIONAL LAW—City Ordinances.—An ordinance of the city of Los Angeles provides that "eight hours' labor constitutes a legal day's work" where the same is performed under a contract with the city; and that any one engaged in performing such a contract who "shall demand, receive, or contract for more than eight hours' labor in one day" from any person, or who shall employ Chinese labor, shall be guilty of a misdemeanor, and shall be subjected to a fine: *Held*, that this is an attempt to prevent persons from employing others in a lawful business beyond certain limits, and the ordinance is unconstitutional, and void.—*Ex parte Kubach*, Cal., 24 Pac. Rep. 737.

41. CONSTITUTIONAL LAW—Exemption from Taxation.—The amendment to article 207 of the constitution, the adoption of which was promulgated the 12th of May, 1888, did not operate to exempt from taxation for the year 1888. The property so assessed owed the tax from the completion of the assessment rolls on the 21st of March, 1888.—*Louisiana & N. O. Ice Co. v. Parker*, La., 7 South. Rep. 898.

42. CONSTITUTIONAL LAW—Office and Officers.—Where a constitution, as revised, provides that an officer holding under the former constitution shall assume an office of another name created by the new, and having all the duties of the other office, and also additional duties, the effect of the new instrument is that the old office shall cease upon the new instrument becoming operative; and this, although some of such additional duties may under the terms of the new instrument be performable for a limited time by another officer.—*State v. Bloxham*, Fla., 7 South. Rep. 873.

43. CONSTITUTIONAL LAW—Oleomargarine Law.—Act Md. 1888, ch. 312, entitled "An act to prevent deception in the sale or use of butter, etc., and to preserve the public health," is a proper exercise of the police power, and is constitutional.—*McAllister v. State*, Md., 20 Atl. Rep. 143.

44. CONSTITUTIONAL LAW—Railroad Aid Bonds.—Under Const. Miss. art. 12, § 14, which declares that the legislature shall not authorize any county, city, or town to aid any corporation, unless two-thirds of the qualified voters of such municipality shall assent thereto at a special election, railroad aid bonds are not invalidated in the hands of innocent purchasers by the fact that less than such majority voted for them, where more than two thirds of the votes cast were in favor issuing the bonds.—*Madison County v. Priestly, Treasurer*, U. S. C. C. (Miss.), 42 Fed. Rep. 817.

45. CONSTITUTIONAL LAW—Taxation.—The charter of the city of Birmingham, § 20, subd. 25, provides that "if there is any property in the city on the 1st day of January of the then current year, which was not in the city on the first day of January of the preceeding year, * * * and consequently not assessed for State taxation during the preceding year, then it shall be lawful for the clerk of the board, and it shall be his duty, to assess such property * * * at a fair valuation, * * * which shall be added to the valuation as assessed for State taxes for the preceding year," and the municipal taxes assessed on the resulting valuation: *Held*, that this section is in violation of Const. Ala. art. 11, § 7, which provides that "no city * * * shall levy or collect a larger rate of taxation in any one year on the property thereof than one-hal fof 1 per cent. of the value of such property as assessed for State taxation during the preceding year."—*Elyton Land Co. v. Mayor, etc.*, Ala., 7 South. Rep. 901.

46. CONSTITUTIONAL LAW—Titles of Laws.—Gen. Laws Tex. 1889, p. 58, purports in its title to be "an act to amend * * * an act for the appointment of receivers, and to define their powers and duties, and to regulate proceedings under such appointment of receivers:" *Held*, that this is not violative of Const. Tex. art. 3, § 35, which provides that "no bill shall contain more than one subject, which shall be expressed in its title."—*Dillingham v. Putnam*, Tex., 14 S. W. Rep. 803.

47. CONTRACT—Action.—The purchaser of a decree for the sale of a tract of land to satisfy a vendor's lien, as part of the consideration therefor, agreed with his vendor, and with parties who had at various times, subsequent to the creation of the lien purchased parts of the

land, that before enforcing said decree he would file a petition to determine the order in which the parcels of land should be sold to satisfy the decree, it being further agreed that the original and subpurchasers of the land, or any one of them, might answer and introduce evidence in support of their claims, and that the court should determine the equities between the original and subpurchasers among themselves, and between each and all of them and the purchaser of the decree: *Held*, that the interests of the parties to the contract were several, and therefore one of them might maintain an action for its breach.—*Burton v. Henry*, Ala., 7 South. Rep. 925.

48. CONTRACT—Construction.—The trustees of a college authorized the former manager of the "commercial department," which had been connected with the college under contract, to raise funds to erect a "commercial building" on the college grounds, with the understanding that so much thereof as was necessary, would be set apart for the use of the commercial department of the college, and that the remainder should be used for dormitories; that the person in charge of that department should enjoy the rents on condition of making repairs, and providing in case he should raise such funds the department should be represented in the faculty; that the college should not be liable for its maintenance; and the students thereof should pay to the college the same matriculation fees and be under the same general regulations as other students: *Held*, that the person so authorized did not become the owner of the building.—*Hillsdale College v. Rideout*, Mich., 46 N. W. Rep. 373.

49. CONTRACT—Extras.—Where a government contract provides that the work done and the materials furnished shall be subject to the inspection of a certain officer, who shall have full power to reject any work or materials which in his opinion do not conform to the plans and specifications of the contract, the contractor can have no extra claim against the government for work done and materials furnished under the requirements of such officer, or for delay in the work caused by such requirements, where the officer made his requirements in good faith, in order to compel the execution of the contract as he understood it, and the contractor failed to make, at the time, any claim for extra compensation for work or material which he now insists were outside of the contract.—*Bowe v. United States*, U. S. C. C. (Ga.), 42 Fed. Rep. 761.

50. CONTRACTS—Interpretation.—Where a written contract to fill in a trestle on a railroad track provides for compensation by the cubic yard of dirt, the contractor cannot recover for the space occupied by a brick culvert constructed by the company under the trestle.—*East Tennessee, V. & G. Ry. Co. v. Matthews*, Ga., 11 S. E. Rep. 841.

51. CONTRACT—Quantum Meruit.—One hired to do work and wrongfully stopped may recover on a *quantum meruit* what the labor done is worth, regardless of its value to the defendant.—*Mooney v. York Iron Co.*, Mich., 46 N. W. Rep. 376.

52. CONTRACT LABOR LAW.—Where immigrants have been prevented from entering the country on the ground that they have come contrary to the provisions of the contract labor law, the finding as to the facts by the superintedent of immigration, when confirmed by the collector, acting pursuant to the regulations of the secretary of the treasury, is a finding of a tribunal duly constituted by law, and is not subject to review by this court.—*In re Tito Rullo*, U. S. C. C. (N. Y.), 42 Fed. Rep. 62.

53. CONVERSION — Damages. — Exemplary damages may be awarded in an action for the conversion of personal property as well as in an action for the recovery of the property itself.—*Argazada v. Villalba*, Cal., 24 Pac. Rep. 656.

54. CORPORATIONS.—A corporation cannot recover on a note given to its defaulting manager by defendant where the evidence shows that it was a personal transaction for the accomodation of such manager, without consideration, and there is no evidence to show that its having been given enables the manager to defraud the company, or assisted him in so doing.—*Societe Des Mines D'Argent v. Mackintosh*, Utah, 24 Pac. Rep. 669.

55. CORPORATION—Liability of Stockholders.—Under Gen. Laws Col. 1883, ch. 19, § 43 providing that "the officers and stockholders of every banking corporation or association formed under the provisions of this act shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation equally and ratably to the extent of their respective stock, * * *" in an action against all the stockholders for the entire debt of the corporation a judgment by default against one for the whole amount will be reversed.—*Buenz v. Cook*, Colo , 24 Pac. Rep. 679.

56. CORPORATION—Service of Process.—It is only where the president of an express company resides in this State that service of process is required to be made upon him by the Code, § 3412. Posting his name in each office where the company transacts business is of no efficacy unless he resides here.—*Southern Exp. Co v. Skipper*, Ga., 11 S. E. Rep. 871.

57. CORPORATIONS—Subscription to Stock.—The fact that a corporation, whose charter provides that "twenty-five per cent. of the capital stock shall be paid in before said company can exercise the privileges and powers herein granted," enters into a contract for the construction of necessary works for the corporation before the 25 per cent. has been paid in, does not release one from his subscription for stock of the corporation.—*Naugatuck Water Co. v. Nichols*, Conn., 20 Atl. Rep. 315.

58. CORPORATIONS — Transfer of Stock.—A *bona fide* purchaser of certificates of stock, upon which a power of attorney, authorizing their transfer to any person, is indorsed by the person in whose name the certificates were issued, and who was the last registered stockholder, takes them relieved of a trust existing back of the registry, though the transfer to such person is not registered.—*Winter v. Montgomery Gas-Light Co.*, Ala., 7 South. Rep. 773.

59. COUNTIES—Highway— Damages.—Construing the constitution of 1877 and the Code together, a right of action exists against a county for damaging private property for public uses in constructing the approaches to a county bridge, thereby elevating the road-way above an adjacent lot so as to hinder access to the lot from the road.—*Smith v. Floyd County*, Ga., 11 S. E. Rep. 850.

60. CRIMINAL LAW—Alibi.—On a trial for arson, where the judge charged that it was for the jury to decide as to the truth of an *alibi*, interposed as a defense, "giving the defendant the benefit of every reasonable doubt," and has further fully charged on the burden of proof, and the subject of reasonable doubt, a verdict of guilty will not be set aside because he also charged that the proof offered to sustain the *alibi* should be subjected to a rigid scrutiny.—*People v. Levine*, Cal., 24 Pac. Rep. 639.

61. CRIMINAL LAW—Assault with Intent to Rape.—On an indictment for assault with intent to commit rape on a female under the age of consent, the admission of evidence that defendant had been guilty of lewd and immoral conduct with other young girls is reversible error.—*People v. Stewart*, Cal., 24 Pac. Rep. 722.

62. CRIMINAL LAW—Burglary—Possession.—On an indictment for burglary it is not error to instruct the jury that, while the possession of stolen property alone is not sufficient proof of defendant's guilt, yet it is a circumstance which if unexplained, tends to establish it, and which, in connection with other evidence, may be sufficient to satisfy the jury that defendant is guilty.—*People v. Hannon*, Cal., 24 Pac. Rep. 706.

63. CRIMINAL LAW—Continuance.—The absence of a witness, though the accused wishes to show and desires to prove material facts by him, and objects to

going to trial without him, is not cause for postponing the trial, where no motion or showing is made for a continuance.—*Johnson v. State*, Ga., 11 S. E. Rep. 844.

64. CRIMINAL LAW—Costs.—A defendant who has been convicted on a second indictment, after the first indictment has been dismissed because of a misnomer, cannot be sentenced to pay any part of the costs of the dismissed prosecution.—*Bazell v. State*, Ala., 8 South. Rep. 22.

65. CRIMINAL LAW—Discharge of Jury.—An order of the court to the sheriff recited that, whereas the business of the court required a jury for the trial of criminal cases, it was ordered that he summon 40 men eligible for jurors. Before defendant's case was reached they were discharged and a new jury summoned by which he was tried: *Held*, that the first jury having been summoned for no fixed term, and for the trial of no particular case, the court could discharge it at any time without cause.—*People v. Murray*, Cal., 24 Pac. Rep. 666.

66. CRIMINAL LAW—Habeas Corpus.—Where an information is set aside, and the prisoner is again examined by the court, acting as committing magistrate on the original complaint, and again held to answer, the error, if error there is, is reviewable on motion to set aside any new information that may be filed, and then on appeal, but not on *habeas corpus*.—*In re Walpole*, Cal., 24 Pac. Rep. 657.

67. CRIMINAL LAW—Homicide.—On trial for murder, the evidence showed that deceased, having been guilty of profanity and indecent behavior in defendant's house, was ordered by defendant to leave the premises, whereupon an altercation ensued, which resulted in the killing: *Held*, error to instruct the jury that "it was the duty of defendant to avoid the killing, if he could have done so without danger," since the defendant being in his own house, was under no obligation to retreat.—*Brinkley v. State*, Ala., 8 South. Rep. 22.

68. CRIMINAL LAW—Homicide.—To justify one person in taking the life of another, it must appear that it was done to prevent the commission of a felony by the latter upon the former. The killing, however, if not justifiable, is not murder in the first degree, unless done purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery or burglary; and there must be some other evidence than the mere proof of killing to constitute it murder in the first degree, unless effected in the commission or attempt to commit a felony; and the deliberation and premeditation necessary in such a case must be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion.—*State v. Olds*, Oreg., 24 Pac. Rep. 394.

69. CRIMINAL LAW—Insanity of Accused.—Pen. Code Cal. § 1368, provides that "when an action is called for trial, or when the defendant is brought up for judgment on a conviction, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury." The court allowed evidence, on the trial of defendant, as to his sanity after and before the the time of the alleged offense, but refused to instruct that if the jury believed defendant insane at the time of the trial they should acquit him: *Held*, that it could not be said that the court had doubt as to the defendant's then sanity necessitating his ordering the submission of the question to the jury.—*People v. Lee Fook*, Cal., 24 Pac. Rep. 654.

70. CRIMINAL LAW—Instructions.—A party charged with crime is entitled to an acquittal unless proved guilty beyond a reasonable doubt. But when a judge fails to charge that the evidence must establish guilt beyond a reasonable doubt, and the evidence is not incorporated in the bill of exceptions, and the record discloses neither a request for the instruction, nor that the omission to charge was called to the judge's attention, the judgment will not be reversed on a writ of error.—*Kurtz v. State*, Fla., 7 South. Rep. 869.

71. CRIMINAL LAW—Limitations.—Pen. Code Cal. § 801, providing that an information for a misdemeanor must be filed within a year, bars prosecution of an accused taken before a magistrate who, at his request, continued the hearing from time to time until the year expired, when he was bound over, and an information filed.—*People v. Ayhens*, Cal., 24 Pac. Rep. 635.

72. CRIMINAL LAW—Lotteries.—Code Ala. 1886, § 4068, forbids setting up or carrying on a lottery, or selling tickets in such lottery. Section 4069 prohibits the sale of lottery tickets in the State: *Held*, that an indictment alleging in one count that defendant sold a lottery ticket, and in another that he sold a ticket in the Louisiana State Lottery, charged an offense under the latter section, since the former section applied only to lotteries within the State.—*Ex parte Hawkins*, Ala., 8 South. Rep. 19.

73. CRIMINAL LAW—Murder.—In a trial for murder in the first degree, proof of malice and premeditation need not be express or positive, but may be deduced from all the facts attending the killing; and if the jury can reasonably and satisfactorily infer from all the evidence the premeditation or intention to kill, and all the other ingredients which are necessary to constitute murder in the first degree, it is sufficient.—*Yates v. State*, Fla., 7 South. Rep. 880.

74. CRIMINAL LAW—New Trial.—A new trial, after a conviction for burglary, will not be granted on the affidavit of a third person that defendant was at her house, 20 miles from the scene of the burglary, when it was alleged to have been committed, as defendant must have known of this evidence at the time of the trial, and could have then procured it by the slighest diligence.—*Lynch v. State*, Ga., 11 S. E. Rep. 842.

75. CRIMINAL LAW—Perjury.—Code Ga. § 1259*a*, provides that the county school commissioners "shall be empowered and authorized to administer such oaths as may be necessary in transacting school business:" *Held*, upon an indictment for false swearing, that a school commissioner had authority to administer an oath to the defendant upon the presentation of an account for services as a teacher.—*Lavender v. State*, Ga., 11 S. E. Rep. 861.

76. CRIMINAL LAW—Self-defense.—When a killing is claimed to have been necessary for self-defense, it is proper to instruct that defendant "must have acted under the influence of such fears alone."—*People v. Adams*, Cal., 24 Pac. Rep. 629.

77. CRIMINAL LAW—Smuggling.—An indictment for smuggling "smoking opium" and "prepared opium" sufficiently describes dutiable merchandise under 22 U. S. St. at Large, p. 495, § 2502, prescribing a duty on "opium prepared for smoking, and all other preparations of opium not specially enumerated or provided for in this act."—*United States v. Gardner*, U. S. C. C. (N. Y.), 42 Fed. Rep. 832.

78. CRIMINAL LAW—Bond.—Judgment for the penalty of a *supersedeas* bond or recognizance given in a criminal case for the appearance of the accused cannot be entered up on mere motion, without suit by *scire facias* or otherwise. A judgment so entered is a nullity, and a motion to set it aside should be granted.—*Robinson v. Gordon*, Ga., 11 S. E. Rep. 844.

79. CRIMINAL LAW—Territorial Courts—Cumulative Sentences.—Rev. St. Idaho, § 7237, providing that cumulative sentences may be imposed on a person convicted of two or more crimes, applies to offenses against the United States tried in the territorial courts.—*In re Esmond*, U. S. D. C. (S. Dak.), 42 Fed. Rep. 827.

80. CRIMINAL PRACTICE—Conspiracy to Commit Larceny.—An indictment averred that defendant, and S and H, "together with divers other evil-disposed persons," did conspire to steal certain chattels, "the property of and in the possession of the United States," and that thereafter "the said S, together with the said divers other evil disposed persons," in execution and furtherance of the said conspiracy, did unlawfully and feloniously steal, etc.: *Held*, that the indictment

charged the defendant with the conspiracy only, and not with the larceny, and an objection to a conviction for the conspiracy, on the ground that, as it was a misdemeanor only, it was merged in the larceny, which was a felony, could not be sustained.—*United States v. Gardner*, U. S. C. C. (N. Y.), 42 Fed. Rep. 829.

81. CRIMINAL PRACTICE—Embezzlement.—An indictment which charges that the defendant, being the bailee of S, "did embezzle, or fraudulently convert to his own use, money to about the amount of $150, the personal property of said S, which came to his possession by virtue of said employment," is sufficient, though it does not describe the money or allege its value, since such indictment pursues the form given in 2 Code Ala. 270.—*Huffman v. State*, Ala., 8 South. Rep. 23.

82. CRIMINAL PRACTICE—Former Jeopardy.—That a *nolle prosequi* was entered without the prisoner's consent after issue was joined and the jury were sworn will bar a subsequent indictment for the same assault with intent to murder, where the first indictment alleged that offense, and was good and sufficient for a simple assault, even if not so for the aggrevated assault charged. There can be no second jeopardy as to either grade of assault, and, as the major includes the minor, the second indictment comprehends the same simple assault of which the accused was acquitted on the first indictment.—*Franklin v. State*, Ga., 11 S. E. Rep. 876.

83. CRIMINAL PRACTICE—Indictment—Name.—An indictment against a man by the initial of his Christian name only is subject to plea in abatement, unless the grand jury add that his name is unknown to them otherwise than is set out.—*United States v. Upham*, U. S. C. C. (Ala.), 42 Fed. Rep. 68.

84. CRIMINAL PRACTICE—Kidnapping.—Though a commitment of one charged with the crime of kidnapping is defective in that it does not contain the name of the person alleged to have been kidnapped, this defect is not such as to entitle the accused to be released on *habeas corpus*.—*Ex parte Keil*, Cal., 24 Pac, Rep. 742.

85. CRIMINAL PRACTICE—Nolle Prosequi.—A judgment of the superior court denying a motion for an order discharging the accused because he was not tried pursuant to his demand for trial made and entered at a previous term of the court is, until reversed or set aside, conclusive both upon the motion itself and the insufficiency of the cause or grounds thereof.—*Brown v. State*, Ga., 11 S. E. Rep. 831.

86. CRIMINAL PRACTICE—Nolle Prosequi.—Where on appeal from a conviction the judgment is set aside and vacated and the district attorney thereafter and before further procedings enters a *nolle prosequi* though this does not amount to an acquittal of the offense, defendant is entitled to be released on the complaint, at least until some step is taken to recall the *nolle prosequi* and revive the complaint.—*Commonwealth v. McClusky*, Mass., 25 N. E. Rep. 72.

87. CRIMINAL PRACTICE—Perjury.—An indictment for perjury under Rev. St. § 5392, must allege, among other things, that the false oath was taken willfully; and an allegation that it was corruptly taken does not embrace the element of willfulness.—*United States v. Edwards*, U. S. C. C. (Ala.), 42 Fed. Rep. 67.

88. CRIMINAL TRESPASS—Indictment.—Code Ala. § 3878, makes it a criminal offense for any one of several parties occupying or cultivating land under a common fence to turn stock into such inclosure, or knowingly suffer such stock to go at large therein without sufficient guard, and provides that it shall not apply when there is no growing or outstanding crop on the land, nor between December 25th and March 1st: *Held*, that an indictment under said section must show that the accused was not within the exceptions.—*Mays v. State*, Ala., 8 South. Rep. 28.

89. DEED—Description—Monuments and Distances.—Where there is no ambiguity in the description of land in a deed of conveyance, parol testimony is inadmissible to vary or qualify the description.—*Andreu v. Watkins*, Fla., 7 South. Rep. 876.

90. DEED—Evidence.—Where the person in possession of the deed produces a letter in the handwriting of the administrator of the grantee therein, stating that he sends him the deeds therewith, and advising him to commence suit, this is sufficient evidence that the deed comes from the proper custody.—*Swicord v. Hooks*, Ga., 11 S. E. Rep. 863.

91. DEED—Interpretation. Under a deed by which a father gives certain land to his daughter and to her children, if she should have any, providing that if the daughter should die leaving neither children nor grandchildren the land should belong to and be divided among grantor's heirs, the daughter takes a fee subject to be divested upon her dying without child or grandchild.—*Greer v. Pate*, Ga., 11 S. E. Rep. 869.

92. DIVORCE—Cruelty.—Though Civil Code Cal. § 94, defines "extreme cruelty" as "the infliction of grevious bodily injury or grevious mental suffering upon the other by one party to the marriage," a divorce should not be granted the wife on the ground of extreme cruelty because the husband, when intoxicated, and in the presence of others, called her a "whore," and other vile names, where the evidence shows that she was not uniformly kind to him, and that the mental suffering endured by her did not injure her health.—*Waldron v. Waldron*, Cal., 24 Pac. Rep. 649.

93. DIVORCE—Insanity.—A divorce on default for "inhuman cruelty" of a wife declared insane a month later, should be set aside on a showing by her guardian that the "cruelty" was the result of insanity existing when the process was served on her.—*Cohn v. Cohn*, Cal., 24 Pac. Rep. 659.

94. DURESS—Imprisonment.—A master who by means of threats of a criminal prosecution for embezzlement procures from his servant a sum of money and the surrender of evidences of indebtedness, and who at the same time agrees to restore the property if he should subsequently become convinced of the servant's innocence, cannot retain the property after the latter's innocence is established in a civil action to which the master is a party.—*Landa v. Obert*, Tex., 14 S. W. Rep. 297.

95. DURESS—Mortgage.—*Held*, upon the facts that, though no open threats were made, both mortgages were voidable for undue influence, a moral force having been exerted controlling her will.—*Meech v. Lee*, Mich., 46 N. W. Rep. 383.

96. EJECTMENT—Evidence.—In ejectment defendants offered in evidence the records of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. Plaintiff objected to its admission on the ground that he was not a party to the action: *Held* that, while the judgment was not admissible as bearing on the title, it was admissible to show where the right of possession was from the service of summons in the action.—*Spotts v. Hanley*, Cal., 24 Pac. Rep. 738.

97. EQUITY—Amendment.—A bill alleged that certain land was conveyed to complainant and her husband; that they made to defendants, to secure a debt of the husband's, a mortgage, in which complainant was not named or designated as grantor, but which was signed by her; that the land was sold under the mortgage, defendants becoming the purchasers; that complainant had an undivided half-interest in the land: *Held*, that an amendment, alleging that the land could not be equitably divided among the tenants, and inserting a special prayer for a sale of the land for the purpose of partition in place of a special prayer that she be placed in possession of her interest as tenant in common was properly allowed.—*Fite v. Kennemre*, Ala., 7 South. Rep. 926.

98. EQUITY—Laches.—Plaintiff claimed an undivided half-interest in a tract of land originally granted by the Mexican government to her father and the ancestor of one B. Under Act Cong. July 22, 1854, providing for the

appointment of a surveyor general to investigate claims to land arising under Mexican laws, B, as the sole owner of the whole of said tract, applied for and obtained an approval of the grant; and subsequently, as sole owner, he applied for and obtained a confirmation by congress of the grant. The acts of approval and confirmation were of record: *Held*, that, in the absence of any contract by B to convey to plaintiff, and of disability to sue, the failure of the latter, from and after such act of confirmation, to prosecute her claim to said land, on the theory that B was chargeable with a resulting trust in her favor, was imputable to her as laches.—*De Mares v. Gilpin*, Col., 24 Pac. Rep. 568.

99. EQUITY—PLEADING.—A bill in equity which alleges defendant contracted to build a house for plaintiff on land which he had leased to her, and failed to do so, whereupon she built it herself, to her damage a named sum, and that she was evicted before the expiration of her term, states facts sufficient to warrant a recovery of damages.—*Brantley v. Mayo*, Ga., 11 S. E. Rep. 864.

100. EQUITY—Rescission.—The courts of this State have jurisdiction over an action between non-residents to rescind, on the ground of the vendor's fraud, a sale of mining property situated in a foreign country, where the contract of sale was entered into in this State, and where the consideration, consisting partly of money, and partly of notes executed by a citizen of this State secured by mortgages on land within the State, is in the hands of the vendor's agent, a resident of this State.—*Loaiza v. Lery*, Cal., 24 Pac. Rep. 707.

101. EQUITY PLEADING—Suits Against Corporations.—Under equity rule 94, which provides that every bill brought by one or more stockholders against a corporation and others, founded on rights which may properly be asserted by the corporation, must set forth with particularity the efforts of the plaintiff to secure suchaction as he desires on the part of the directors, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, the court has no jurisdiction of a bill to enjoin the transfer of part of the stock of the defendant to another corporation, which fails to set forth such efforts, though it allege that the directors of the one corporation are also directors of the other, that it would have been useless for plaintiff to demand that they would bring suit, and that plaintiff would have made such demand had he not known that they would refuse.—*Squair v. Lookout Mountain Co.*, U. S. C. C. (Tenn.), 42 Fed. Rep. 729.

102. EQUITY PRACTICE—Master's Sale.—Where a purchaser at a master's sale refuses to pay his bid, and the court thereupon refuses to release him and orders a resale at his risk and expense, he is not entitled to any benefit from the resale in case the property brings a larger price than before.—*Chase v. Joiner*, Tenn., 14 S. W. Rep. 331.

103. ESTOPPEL IN PAIS.—In trespass to try title, the evidence showed that the land in question belonging to plaintiffs' ancestor was condemned for the purpose of a seat of government for the republic of Texas, and he received in payment therefor the obligation of the republic as provided by law; that the year after those procedings he paid taxes in order that a patent might issue, that being thought necessary to perfect the republic's title, but paid no taxes after that, though he lived for 25 years longer; and that he saw the land divided up and sold without making any objection: *Held*, that he was estopped to claim the land, as are his heirs, whether the condemnation proceedings were valid or not.—*Hardeman v. Maud*, Tex., 14 S. W. Rep. 287.

104. EVIDENCE—Entries in Books of Account.—Original entries made in the ordinary course of business, and contemporaneously with the transactions to which they relate, are admissible in evidence, such entries being corroborated by the party who made them, or, in case of his death, or indefinite absence from the State, proof of his handwriting being given.—*McDonald v. Carnes*, Ala., 7 South. Rep. 919.

105. EVIDENCE—Signature.—In an action by plaintiff for wages accruing after his discharge by defendant company, he may introduce without proof of the signature, a letter purporting to be signed by defendant's president, and received by plaintiff, accepting terms previously offered by plaintiff, where plaintiff thereupon went to defendant, and his services were accepted; this being an implied admission of the writer of the genuineness of the signature.—*Troy Fertilizer Co. v. Logan*, Ala., 8 South. Rep. 46.

106. EXECUTION—Claims By Third Persons.—Under Code Ga. § 3740, which provides that a claimant shall not be permitted to withdraw or discontinue his claim more than once without the consent of the plaintiff in execution, a claimant of goods seized under execution, is entitled to withdraw his claim once, though he had been surety on the claim and forthcoming bonds of a former claimant whose claim had been withdrawn.—*Mercer v. Baldwin*, Ga., 11 S. E. Rep. 846.

107. EXECUTION—Levy and Lien.—Where an execution is based solely on an attachment before a justice of the peace, and it is not shown that defendant had notice, as provided by Code Ga. § 3309, or that he replevied the property, or that he appeared and defended, the levy will be dismissed as to property not described in the attachment, and claimed by third persons, though the execution and levy were general.—*Reeves v. Chattahoochee Brick Co.*, Ga., 11 S. E. Rep. 837.

108. EXECUTION—Sale Subject to Mortgage.—Where property is sold on execution expressly subject to a mortgage held by the debtor's wife, and bought by the plaintiff, an agreement between him and the debtor, as his wife's agent, that she would waive the bond required of the creditor to have the property forthcoming, and allow the proceeds of the sale to be disposed of by the court, does not give her the right to claim such proceeds on a mortgage *fi. fa.*—*Hidell v. Lamkin*, Ga., 11 S. E. Rep. 836.

109. EXECUTORS AND ADMINISTRATORS—Demands.—Under Rev. St. Tex. art. 2067, where an administrator has allowed a claim, but rejected in part the lien of the mortgage securing it, he can only enforce his lien in the county court, and no jurisdiction for that purpose is conferred on the district court by article 2028.—*Western M. & I. Co. v. Jackman*, Tex., 14 S. W. Rep. 305.

110. EXEMPTIONS.—How. St. Mich. § 7716, as amended by Pub. Acts 1885, No. 159, § 2, which provides that personal property otherwise exempt from execution shall be liable to levy under a judgment for the purchase price, and that any sale thereof after the commencement of a suit for such purchase price, and the filing of notice with the clerk of the city, village, or township of the owner's residence, stating the time of the commencement of action, the defendant's name, the amount due, and a description of the property sought to be reached, shall be null and void, is not limited in its application to those cases in which no security for the debt has been taken.—*Roberts v. McGur*, Mich., 46 N. W. Rep. 370.

111. EXEMPTION—Waiver-Where a judgment on a note containing a waiver of exemptions does no declare the waiver, such waiver cannot be taken advantage of in a garnishment suit brought on the judgment.—*Courie v. Godwin*, Ala., 8 South. Rep. 9.

112. FEDERAL COURTS—National Banks.—Under Rev. St. U. S. § 563, giving district courts jurisdiction "of all suits by or against any association, established under any law providing for national banking associations, within the district for which the court is held," and Act Cong. Aug. 13, 1888, § 4, making national banking associations, for the purpose of all actions, citizens of the State wherein they are located, district courts have no jurisdiction of an action on a promissory note, brought by a national bank in a district other than that in which the bank is located.—*Farmers' Nat. Bank v. McElhinney*, U. S. D. C. (Iowa), 42 Fed. Rep. 801.

113. FEDERAL OFFENSE—Election Laws.—Under Rev. St. U.S. § 5515, an indictment charging that the defendants, members of the county commissioners' court, "unlawfully, fraudulently, corruptly, and feloniously,"

suppressed the return of certain ballots, without charging that the offense was committed "knowingly," and without setting out the acts which constituted such suppression, is fatally defective.—*United States v. Kelsey*, U. S. D. C. (Tex.), 42 Fed. Rep. 882.

114. FEDERAL OFFENSE—Larceny from Mails.—Rev. St. U. S. § 4467, provides: "Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter * * * which shall contain any note, bond, * * *,"—but provides no penalty after such clause. After a semicolon, it further provides: "Any such person who shall steal or take away of the things aforesaid out of a letter, * * * shall be punished," etc.: *Held*, that since there is no penalty attached to the first clause, the section only covers the offense described in the second, of stealing or taking away.—*United States v. Hartley*, U. S. D. C. (Miss.), 42 Fed. Rep. 835.

115. FEDERAL OFFENSE—Obscene Matter Through the Mails.—Rev. St. U. S. § 3893, as amended by act of September 26, 1888, making it an offense to deposit in the post-office, for mailing or delivery, any "obscene, lewd, or lascivious book, pamphlet, picture, paper, letter. * * * of an indecent character, * * * whether sealed as first-class matter or not," includes a private letter, inclosed in a sealed envelope, and containing such prohibited matter.—*In re Wahll*, U. S. D. C. (Minn.) 42 Fed. Rep. 822.

116. FIXTURES—Mortgagor and Mortgagee.—Defendants admitted plaintiffs into partnership and joint possession with themselves of a factory, their business homestead, plaintiffs making a cash payment, and defendants and their wives executing a deed of half of the property, to be delivered when plaintiffs had made the entire payment. This payment was never made, and the money which was paid was returned, and the trade was voluntarily rescinded. The partnership was dissolved, and notes were given by defendants to plaintiffs for a balance due on their partnership account, secured by a deed of trust on certain machinery in the factory: *Held*, that whether this machinery was put in factory by plaintiffs or by defendants, if they were attached to the factory with the intention of using them permanently as a part of the same, and if they were adapted to such use, they would be fixtures, and part of the same, and if they were adapted to such use, they would be fixtures, and part of the homestead, and therefore not subject to the deed of trust.—*Phelan v. Boyd*, Tex., 14 S. W. Rep. 290.

117. FRAUDULENT CONVEYANCE — Evidence. — Where merchants in failing circumstances sell their store and goods at a fair price, for a new consideration, the purchaser to make certain payments presently, but the bulk in the future, it is for creditors claiming that the sale is in fraud of their claims to show that the purchaser had actual or constructive notice of his vendors' financial condition.—*Kellar v. Taylor*, Ala., 7 South. Rep. 907.

118. FRAUDULENT REPRESENTATIONS—Rescission.—One who has been induced by fraudulent representations to purchase property, giving his negotiable promissory notes therefor, may rescind the contract upon the discovery of the fraud; and if he exercises that right, and asserts it as a defense to an action on his note by an indorsee, it becomes incumbent on the plaintiff, in order to overcome that defense, to show that he purchased the note for a valuable consideration, and without notice of the fraud.—*MacLaren v. Cochran*, Minn., 46 N. W. Rep. 408.

119. GARNISHMENT—Public Officers.—The trustees of a State asylum are not subject to a process of garnishment at the suit of creditors of those to whom money of the State in their hands is to be disbursed.—*O'Neill v. Sewell*, Ga., 11 S. E. Rep. 831.

120. GUARDIAN — Illegitimate Child.— The ordinary cannot appoint a guardian of a minor whose father is living, unless the child owns property. The mother of a bastard child is its natural guardian, and as such is bound to maintain it, and has a right to its custody and services.—*Friesner v. Symonds*, N. J., 20 Atl. Rep. 257.

121. GUARDIAN AND WARD—Allowance.—A guardian collected the money of his wards, used it, and did not attempt to account for it until compelled to do so ten years later. When the guardian was appointed the wards were living with their elder brother, and continued to live with him thereafter. As soon as the guardian was cited to account, he, without any demand being made, proposed to pay the brother for the wards' board, and gave him his note for a certain amount therefor. There was no evidence that there was any agreement for any board to be paid, or that the elder brother claimed anything, or that their keeping was worth anything above what their work was worth to him: *Held*, that the court properly disallowed the claim for board, and charged the guardian with compound interest on the money received by him.—*In re Eschrich's Estate*, Cal , 24 Pac. Rep. 634.

122. GUARDIAN'S ACCOUNT—Evidence.—In the settlement of a deceased guardian's account there was evidence that he had received a certain amount of money. It appeared also that he had loaned certain money, and held a note for it at his death payable to him as guardian: *Held*, that, there being no evidence that this was not the same money which it was shown he had received, he could not be charged with both amounts. —*Thompson v. Duncan*, Ga., 11 S. E. Rep. 860.

123. HOMESTEAD—Intent to Occupy.—Under Rev. St. Tex. 1879, § 2336, exempting the homestead, "provided that it shall be used for the purpose of a home," the right attaches to land purchased for a home in March by one who, before a levy in November following, begins to prepare it for occupation by such acts as clearly show an intention to live on it with his family within a reasonable time.—*White v. Wadlington*, Tex., 14 S. W. Rep. 296.

124. HOMESTEAD—Merger.—In setting apart a year's support Code Ga. 1882, § 2574, provides that "the property so set apart shall vest in the widow and child or children," and section 2271 provides that where two estates unite in the same person the less merged in the greater: *Held*, that where a widow's homestead is set apart for a year's support the homestead estate is thereby changed and merged into an absolute estate in fee, subject to her debts.—*Lowe v. Webb*, Ga., 11 S. E. Rep. 845.

125. HOMESTEAD — Trust-Deed.—Under Const. Tex. art. 16, § 50, and Rev. St. Tex. art. 3174, which provide that no lien can be created upon a homestead except for the purchase-money, "or for work and materials used in constructing improvements thereon," a trust-deed upon a homestead to secure money borrowed for the purpose of erecting a building thereon creates no lien.—*Ellerman v. Wurz*, Tex., 14 S. W. 333.

126. HOMESTEAD — Wife's Acknowledgment.— Under Code Ala. § 2508, providing that no conveyance of a homestead by a married man shall be valid unless separately acknowledged by the wife, where she fails to acknowledge it at the time of its execution, or subsequently during the husband's life, her acknowledgment after his death cannot affect the title of decedent's heirs.—*Richardson v. Woodstock Iron Co.*, Ala., 8 South. Rep. 7.

127. HUSBAND AND WIFE—Community Property.—The administrator of the wife, in Texas, cannot maintain a suit against the surviving husband to enjoin a sale of the wife's interest in community property, or to recover such property from a purchaser from him.—*Moody v. Smoot*, Tex., 14 S. W. Rep. 285.

128. HUSBAND AND WIFE—Parol Trust.—A husband conveyed land to his wife, who had left him for his intemperance. The idea was his own, and she refused the deed until she at last yielded to his persuasion: *Held*, on a bill to declare a trust based on an oral promise that if the husband, who was going abroad, "returned home a sober man, free from his habits of dissipation, she would return to him, and live with him as

his wife," and the deed should become "null and void, and of no effect," that the promise was within the statute of frauds as creating a trust otherwise than in writing, and its breach was not a fraud against which equity can relieve.—*Brock v. Brock*, Ala., 8 South. Rep. 12.

129. INHERITANCE—Illegitimate Children—Polygamy.—The "Anti-Polygamy Act" (Act Cong. July 1, 1862, § 2) provides that the act shall be construed to "annul all acts and laws which establish, maintain, protect or countenance the practice of polygamy," etc.: *Held*, that the act annuls Act Utah, March 3, 1852 (Comp. Laws 1876, § 677), which provides that "illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children."—*Chapman v. Handley*, Utah, 24 Pac. Rep. 673.

130. INJUNCTION—Bill.—Ordinarily, where the equities of the bill are denied by answer, a preliminary injunction will be refused, or if granted on bill will be dissolved; but the rule is not inflexible, there being an exception in cases of irreparable mischief, and the granting or continuing of injunctions always resting in the sound discretion of the court, to be governed by the nature of the case. And the rule is modified in this State by the statute which authorizes either party to introduce evidence in support or denial of the bill or answer before the injunction shall be dissolved.—*Fuller v. Cason*, Fla., 7 South. Rep. 870.

131. INJUNCTION—Erroneous Taxation.—A bill praying an injunction against the sale of land for taxes on the ground that part of it is exempt, and that there was an irregular assessment and an overvaluation of the rest, is bad on demurrer where it fails to allege that complainant appeared and made such objections as required by St. Mont. 15th Ex. Sess. p. 92, § 22, before the board of county commissioners sitting as a board of equalization as therein provided.—*Northern Pac. Ry. Co. v. Patterson*, Mont., 24 Pac. Rep. 704.

132. INSURANCE—Conditions.—Where, before obtaining a policy of insurance containing a provision that it would be void if the property were mortgaged without the written consent of the company, the assured exhibits to the soliciting agent papers showing the nature and extent of the incumbrances, the agent, and through him the company, are charged with notice thereof.—*Phœnix Ins. Co. v. Copeland*, Ala., 8 South. Rep. 48.

133. INTEREST—Rule for Computing.—In Michigan, the rule for computing interest is the Massachusetts, and not the Connecticut, rule; that is, partial payments, instead of being applied directly to the discharge of the principal, are first applied to the payments of the interest then due.—*Wallace v. Glaser*, Mich., 46 N. W. Rep. 227.

134. INTERPLEADER—Issues.—The recitals of a bill of strict interpleader should give so full a statement of complainant's claim as to demonstrate that he has no interest in the thing in controversy. Complainant cannot adjust his own claims against the matter in controversy, and ask defendants to interplead as to the balance. Strict interpleader is where depositary holds as depositary merely, and the claims are made against him in that character only.—*Williams v. Matthews*, N. J., 20 Atl. Rep. 261.

135 INTOXICATING LIQUORS.—The act of March, 3, 1888, entitled "An act to further provide against the evils resulting from the traffic in intoxicating liquors, by local option, in any township of the State of Ohio," and the act of May 14, 1886, entitled "An act providing against the evils resulting from intoxicating liquors," relate to the same general subject, and, where necessary to a clear understanding of either, are to be construed together. So construed, a mode is provided in section 3 of the last named act for the return to a dealer who has paid the tax, and has discontinued business by reason of the traffic having been prohibited in the township, under the act of March 3, 1888, of the ratable proportion of the tax paid, to which he is entitled under section 4 of that act. Hence said section 4 is not incapable of execution.—*State v. Rouch*, Ohio, 25 N. E. Rep. 59.

136. INTOXICATING LIQUORS — Constitutional Law.—Under Const. Ala. art. 4, § 2, providing that "each law shall contain but one subject, which shall be clearly expressed in its title," the provision of Act Feb. 10, 1883 (Acts 1882-83, p. 342), entitled "an act to establish a separate school district, to be known as the * * *, and for the appointment of a board of trustees for said school district, with certain powers and privileges," which requires, as a condition precedent to the granting of a liquor license, that the applicant have the recommendation of such board as to his moral fitness, is unconstitutinnal, the words of the title, "with certain powers and privileges," having no force.—*Glenn v. Lynn*, Ala., 7 South. Rep. 924.

137. INTOXICATING LIQUORS—"Elections."—Rev. St. Ind. 1881, § 2098, making it a crime to sell or give away intoxicating liquors to be drunk as a beverage "on the day of any election" in the town or city where the same may be holden, includes the day of a "primary election" held by a political party to select candidates.—*State v. Hirsch*, Ind., 24 N. E. Rep. 1062.

138. INTOXICATING LIQUORS—Ordinance.—Though the punishment for failure to obtain liquor license provided by an ordinance conflicted with that prescribed by a statute, this portion of the ordinance could be rejected, and that providing for the license could stand, as they were not dependent on each other.—*Ex parte Christensen*, Cal., 24 Pac. Rep. 747.

139. JUDGMENT.—It is no objection to a suit on a judgment that the time within which an execution could be issued on the judgment has not expired.—*Hickman v Macon County*, U. S. C. C. (Mo.), 42 Fed. Rep. 759.

140. JUDGMENT.—Under Code Civil Proc. Cal. §§ 911, 912, a justice's docket containing a minute of a judgment is sufficient proof of the judgment to justify the action of the constable in taking property under execution thereon, where such docket is introduced in an action on the constable's bond for damages for the seizure.—*Beardsley v. Frame*, Cal., 24 Pac. Rep. 721.

141. JUDGMENT—Default.—No ground for motion to set aside judgment by default that defendant's counsel were waiting to file a plea when the case was called on the docket, but that it was called out of its order and they did not hear it.—*McDaniel v. McLendon*, Ga., 11 S. E. Rep. 869.

142. JUDGMENT—Equitable Relief.—Equity will relieve where, in *ex parte* proceedings in foreign attachment, advantage, after being waited for, has been deliberately taken of a complainant's absence to obtain, without his knowledge, a judgment upon a claim to which he has a sufficient defense either at law or in equity, and to sell his land for an inadequate price to the plaintiff on the attachment suit.—*Herbert v. Herbert*, N. J., 20 Atl. Rep. 290.

143. JUDGMENT—Estoppel.—Where defendant in an action on a note alleges that it has been paid by the conveyance of certain land, which plaintiff denies, and judgment is rendered for defendant, such judgment finds the title to the land to be in plaintiff, and estops defendant, the former owner, and those in privity with him, from thereafter claiming any interest therein.—*Bradford v. Knowles*, Tex., 14 S. W. Rep. 307.

144. JUDGMENT—Setting Aside Default.—It is not an abuse of discretion to set aside a judgment taken in the absence of defendant on an affidavit of merits, and a showing that he and his counsel resided at a distance, and had not been notified that the case was set for trial, and were absent for that reason only.—*Buell v. Emerich*, Cal., 24 Pac. Rep. 644.

145. JUDICIAL SALE—Administrator.—A sale of real property belonging to the estate of a deceased person, made by an executor or administrator thereof, under an order of a county court sitting in probate, and having jurisdiction over the estate, is not necessarily void,

although the petition for the order of sale, the citation to the heirs, and the service of the citation are defective.—*Mitchell v. Campbell*, Oreg., 24 Pac. Rep. 455.

146. JUDICIAL SALES—Deficiency.—Plaintiff obtained a decree foreclosing a mortgage on two lots, and an order for their sale was put in the hands of the marshal, and a certain sum bid on one of them. The defendants paid to the marshal the difference between that sum and the amount of the decree which he received as being "in full of all demands as deficiency" in the case. The bidder, however, failed to comply with the bid and that lot was sold for a less price, leaving a deficiency: *Held*, that plaintiff was not bound by the marshal's receipt, and was entitled to have the second lot sold to pay the deficiency, though third persons had taken a mortgage thereon on the faith of the marshal's receipt.—*Kershaw v. Dyer*, Utah, 24 Pac. Rep. 621.

147. LANDLORD AND TENANT—Rent.—Gen. St. Ky. ch. 66, art. 2, § 12, provides that all valid liens on personal property of a lessee created before the property was carried on the leased premises shall prevail against distress or attachment for rent; but if the lien is created while the property is on the leased premises, the landlord shall have a lien superior thereto for one year's rent: *Held*, that a mortgage executed on the tenant's personalty on the leased premises is superior to the landlord's lien for rent accruing under a second term of lease.—*Lyons v. Deppen*, Ky., 14 S. W. Rep. 279.

148. LEASE—Insolvent.—The lessee under a lease for a term of months, providing for the payment of certain rent on a certain day in each month, and that in case of default for five days the lessor might enter and terminate the lease, left the premises, and repudiated the lease, being half a month in default. He soon afterwards became insolvent. The lessor immediately entered and tried, without success, to relet the premises, but did not consent to the abandonment, or in any way release the lessee from the lease: *Held*, that the lessor's claim was not for damages, the obligation to pay which was mature before the insolvency, but for rent due, or to become due, within Insolvent Act Cal. 1880, § 42.—*In re Bell's Estate*, Cal., 24 Pac. Rep. 633.

149. LIBEL AGAINST ATTORNEY.—An article published in a newspaper concerning an attorney at law, which would tend to injure his character and reputation as an honest and honorable attorney at law and citizen, would, like any similarly injurious article published against any other person, be *prima facie* libelous; and the fact that it had some connection with judicial proceedings, though not a report of any portion thereof, would not render it privileged or conditionally privileged.—*State v. Wait*, Kan., 24 Pac. Rep. 354.

150. LICENSE—Revocation.—When a license has been so far executed that its revocation would work a fraud actual or constructive upon the licensee, equity will restrain such revocation, although its continuation results in an easement upon the lands of the licensor in favor of the lands of the licensee.—*Morton Brewing Co. v. Morton*, N. J., 20 Atl. Rep. 286.

151. LIMITATION—Adverse Possession.—The statute of limitations will run against the purchaser of land from the United States in favor of one holding adversely only from the issuance of the patent.—*Steele v. Boley*, Utah, 24 Pac. Rep. 755.

152. LIMITATION OF ACTIONS.—The statute of limitations begins to run against the right of the purchaser of personal property to sue for breach of warranty of title from the time that his title is declared invalid by the court of last resort, and not from the time the mandate of such court is filed in the lower court.—*Nickles v. United States*, U. S. C. C. (Mo.), 42 Fed. Rep. 757.

153. MANDAMUS—To Courts.—Where defendant in a pending suit is garnished in a suit against plaintiff, and demands that the proceedings be stayed until plaintiff shall give bond to protect him as such garnishee, as provided by How. St. Mich. § 8105, *mandamus* will not lie to compel the court to set aside its order that plaintiff give such bond and to suspend the garnishee action, on the ground that it was instituted by defendant to hinder plaintiff in the prosecution of his suit.—*Burt v. Reilly*, Mich., 46 N. W. Rep. 380.

154. MARINE INSURANCE.—An insurance "free from partial loss" on a cargo of fertilizer covers a constructive total loss and abandonment.—*Mayo v. India Mut. Ins. Co.*, Mass., 25 N. E. Rep. 80.

155. MARINE INSURANCE—Insurable Interest.—One in possession of a vessel under a written contract with the owners which provides that he shall man and run her for a commission, and hold her as security for his disbursements, has an insurable interest.—*The Gulnare*, U. S. C. C. (La.), 42 Fed. Rep. 861.

156. MARITIME LIEN—Waiver.—One who claimed to have a lien on a vessel for wages, but who had been a witness in, and was consequently chargeable with knowledge of, a controversy over her ownership, and the fact that the vessel was in custody pending such suit, but who held his claim back until after the delivery of the vessel in pursuance of the decree of the court in the possessory action, was *held*, by his delay under such circumstances, to have waived his lien on the boat.—*The Seminole*, U. S. D. C. (N. Y.), 42 Fed. Rep. 924.

157. MARRIAGE BETWEEN SLAVES.—Act Tenn. May 26, 1866, providing that "all free persons of color who were living together as husband and wife in this State, while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may hereafter be acquired, by said parents, to as full extent as the children of white citizens are now entitled by the existing laws of this State," makes legitimate and capable of inheriting the child of slave parents, whose marriage was void under the restrictions growing out of the institution of slavery, though one of the parents may have died during slavery.—*Wallace v. Godfrey*, U. S. C. C. (Miss.), 42 Fed. Rep. 812.

158. MASTER AND SERVANT—Injury.—Plaintiff, switchman for defendant, "off duty" boarded one of its trains on his own accord, and was ordered by the conductor to turn a switch: *Held*, that the conductor had no implied authority to make such command, and the mere act of obeying it did not constitute plaintiff defendant's employee.—*McDaniel v. Highland Ave. & B. R. Co.*, Ala., 8 South. Rep. 41.

159. MASTER AND SERVANT—Negligence.—In an action against a railroad company for injuries to an employee caused by a plank falling on him from a pile driver, evidence that after the injuries the plank was tied in place is not admissible to show negligence on the part of defendant.—*St. Louis, A. & T. Ry. Co. v. Jones*, Tex., 14 S. W. Rep. 309.

160. MECHANICS' LIENS.—Where materials are furnished for the erection of a college for an unincorporated association, a lien on the property may be enforced in an action to which the trustee holding the title for the association, the building committee charged with the superintendence of the building, who accepted the materials, and the contractor who erected the building, are parties defendant.—*Gress Lumber Co. v. Rodgers*, Ga., 11 S. E. Rep. 867.

161. MECHANICS' LIENS—Judgment.—In an action by subcontractors to enforce a lien for materials furnished in the erection of a building, the contract for which, between the owner and contractor, was never filed for record, a judgment for plaintiffs cannot be supported where the complaint does not allege the reasonable value of the materials, and there is no finding as to such value, though the complaint does allege the amount agreed to be paid by the contractor.—*Booth v. Pendola*, Cal., 24 Pac. Rep. 714.

162. MECHANIC'S LIEN—Retroactive Law.—Code Civil Proc. Cal. § 1187, provides that every one save the contractor must, within 30 days after completion, file his statement for a lien. That section was amended in 1887 by adding that cessation from labor for 30 days on any unfinished building, "shall be deemed equivalent to completion." A contractor having, after the amend-

ment, refused to finish the building, and no work having been done thereon for 30 days, of which the material-man had knowledge: *Held*, that the time in which his statement must be filed runs from the end of the 30 days, though part of the materials were furnished before the amendment.—*Kerckhoff-Cuzner M. & L. Co. v. Olmstead*, Cal., 24 Pac. Rep. 648.

163. MECHANIC'S LIEN—Subcontractor.—In an action by a subcontractor to enforce a mechanic's lien, for work done prior to the abandonment of the contract by the contractor, the owners' answer, that, before they had notice of plaintiff's account, the contractors had abandoned the contract, and defendants had paid them more than the materials furnished and work done were worth, and more than the proper proportion of the same under the contract, and that the amount they were obliged to pay for the completion of the building was more than the balance of the contract price, presents a good defense.—*Dudley v. Jones*, Tex., 14 S. W. Rep. 335.

164. MECHANIC'S LIENS—Subcontractors — Notice.—Under Sayles' Civil St. Tex. art. 3176, which provides that subcontractors, in order to obtain a lien, shall give the owner written notice, whereupon he shall retain in his hands the amount claimed until the same has been settled, an owner is not liable to subcontractors for money paid by him to the order of the original contractor before he was served with the notice.—*Burt v. Parker County*, Tex., 14 S. W. Rep. 335.

165. MECHANIC'S LIEN—Water Company.—A water company erected on a lot buildings and machinery to force water to its stand-pipe a half mile distant, through a main, for which plaintiff furnished the piping. Except for 25 feet the main was without the lot, on land in which the company had an easement only: *Held*, in a suit to foreclose a lien for the piping on the lot and the building and machinery thereon, that, except for the 25 feet within the lot, there was no lien.—*Eufaula Water Co. v. Addyston Pipe & Steel Co.*, Ala., 8 South. Rep. 25.

166. MINES AND MINING—Patent—Adverse Suits—Limitations.—Rev. St. U. S. § 2326, provides that a suit upon an adverse claim to a mining location must be begun within 30 days after the claim is filed. Gen. St. Colo. 1883, p. 673, § 18, provides that, in case of failure of a suit from certain causes, the plaintiff may renew his suit at any time within one year: *Held*, that the fact that an adverse suit had failed for a reason within the purview of said State statute did not authorize the plaintiff to begin another suit after the expiration of such 30 days, since said United States statute could not be affected by State legislation.—*Steves v. Carson*, U. S. C. C. (Colo.), 42 Fed. Rep. 821.

167. MORTGAGE—Pleading.—Code Ala. 1886, § 2707, providing that, in an action by a mortgagee against a mortgagor to recover the land conveyed by the mortgage, the defendant "may plead payment of the mortgage debt, or the performance of the condition of the mortgage," does not authorize pleas of usury or set-off.—*McKinnon v. Lessly*, Ala., 8 South. Rep. 9.

168. MORTGAGE—Priority.—At the request of the mortgagor, a certain person paid a first and second mortgage. For the sum so paid and an additional loan the mortgagor gave him a fourth mortgage, there being a third at the time of the payment. The first and second mortgages were not canceled, but were assigned to and retained by the person paying them. There was no agreement or understanding that the first and second mortgages should be considered satisfied: *Held*, that the first and second mortgages were not extinguished, but, together with the remedy thereon, were suspended until the fourth mortgage should become due and unpaid.—*Tolman v. Smith*, Cal., 24 Pac. Rep. 743.

169. MORTGAGES—Sale under Power.—Where part of the amount due a mortgagee is unliquidated and uncertain, and the consideration for the liquidated portion is disputed, a threatened sale of the entire premises covered by the mortgage under a power of sale therein will be enjoined until the equities between the parties can be settled, and the balance due the trustee or mortgagee ascertained.—*More v. Calkins*, Cal., 24 Pac. Rep. 729.

170. MORTGAGE — Satisfaction.— Where a creditor, after bringing suit to foreclose a mortgage assigned to him by his debtor as collateral security, dismisses the suit, accepts a conveyance of the property from the mortgagor, and releases the mortgage, the debtor may charge him with the amount of such mortgage, have it applied in satisfaction of his debt, and recover the balance, though the mortgage was without consideration as between him and the mortgagor, and the note secured by it, and also assigned as collateral, was not negotiable.—*Kelly v. Matlock*, Cal., 24 Pac. Rep. 642.

171. MUNICIPAL CORPORATIONS.—Act Cal. March 19, 1889, provides that the council of a city, on receiving a petition, signed by not less than one-fifth of the qualified electors, for the exclusion of certain territory from its limits, shall submit the question of such exclusion to the electors of the corporation, etc. The article further provides for the publication of notice, and for further proceedings. A second act, passed the next day, is identical with this, except as to the newspapers in which the notice was required to be published: *Held*, that a petition for *mandamus* to compel the council of the city of S. to submit such question to the electors is not demurrable for failing to state under which of these two acts petitioner seeks to proceed.—*People v. Common Council*, Cal., 24 Pac. Rep. 727.

172. MUNICIPAL CORPORATION—Defective Sidewalk.—The fact that plaintiff knew the condition of the sidewalk before the accident does not of itself bar recovery, but is a circumstance to be considered by the jury with the other facts bearing on the question of contributory negligence.—*City of Columbus v. Strassner*, Ind., 25 N. E. Rep. 65.

173. MUNICIPAL CORPORATION—Incorporation.—Laws Wash. 1889 90, p. 280, ch. 1, § 1, relating to the incorporation of cities and towns, contains a proviso that nothing therein contained shall prevent the reincorporation thereunder of towns and villages which had attempted to incorporate under the void act of Febuary 2, 1888; and section 6, empowers such towns and villages to incorporate under section 4: *Held*, the statute does not legalize attempted incorporations under the void act, but provides for incorporation by taking the steps prescribed in section 4.—*In re Campbell*, Washington, 24 Pac. Rep. 624.

174. MUNICIPAL CORPORATIONS—Public Improvements.—Under Acts 22d Gen. Assem. Iowa, ch. 11, which authorizes cities to establish and maintain electric light plants when the majority of the voters of a city shall by vote approve the same, a city may erect an electric plant for the purpose of furnishing light to its inhabitants in their stores and houses, as well as for lighting the streets and public places of the city.—*Thompson-Houston Electric Co. v. City of Newton*, U. S. C. C. (Iowa), 42 Fed. Rep. 723.

175. MUNICIPAL CORPORATION—Street Commissioner.—In the absence of express legislative authority to remove a street commissioner whose appointment for a fixed period is authorized by the charter of a city, (charter of Menominee, Mich. ch. 5, § 3; ch. 8, § 17), it will be presumed that it was intended that such officer should hold his office until the expiration of his term unless removed therefrom for cause after a fair trial.—*Hallgrene v. Campbell*, Mich., 46 N. W. Rep. 381.

176. MUNICIPAL CORPORATIONS—Street Improvements.—Where a contract with the city of Philadelphia for paving a street contains no stipulation as to when the work shall be finished, but provides that it shall be done in compliance with the city ordinances, it will be treated as stipulating for the performance of the work in two years, as Ord. Phila. 1872, p. 199, provides that all paving contracts shall contain a condition that the work shall be finished in two years from date, and in default thereof the contract shall be void.—*City of Philadelphia v. Jewell's Estate*, Penn., 20 Atl. Rep. 281.

177. MUNICIPAL ELECTIONS.—Where in executing a power conferred by the city charter upon a majority of the city council to order an election for mayor, "by giving at least ten days' notice in any one or more of the city papers," an attempt was made to give the requisite notice in two papers, but it was given in one only, the power was well executed, and there was no sufficient reason for postponing the election, or revoking the order for holding it at the time specified, and appointing a different time.—*City Council v. Youmans*, Ga., 11 S. E. Rep. 865.

178. NEGLIGENCE—Irrigation Companies.—Defendants permitted the water to overflow the banks of their ditch, and flood plaintiff's land, though they had been warned that the ditch was running too full, and that the water was in danger of escaping unless the flow was diminished. After this warning the superintendent, at the request of one of the trustees of the company, raised the head-gates, and increased the flow: *Held*, that defendats were liable under Gen. St. Colo. §§ 312, 1728, 1733, requiring the owners of ditches and canals to keep them in good condition, so as to prevent the escape of water to adjacent property.—*Greeley Irrigating Co. v. House*, 24 Pac. Rep. 329.

179. NEGOTIABLE INSTRUMENT—Escrow.—In an action on a note, an answer alleging that the note was executed in consideration of the extension of a street railroad by the payee, and deposited with a bank, with the stipulation that it was not to be delivered until the condition was fulfilled, but that the road has not been so extended, is not demurrable.—*McLaughlin v. Clausen*, Cal., 24 Pac. Rep. 636.

180. NEGOTIABLE INSTRUMENT—Pleading.—Where, in an action on a note, one defendant, a co indorser thereon, has answered unqualifiedly admitting that he indorsed the note, it is not error to allow him to amend by alleging that for a valuable consideration his co-indorser agreed to hold him harmless on the note, that not being inconsistent with his former admission.—*McPherson v. Weston*, Cal., 24 Pac. Rep. 733.

181. NEGOTIABLE INSTRUMENT—Ratification.—Defendant, being informed by a third person that he had deposited her note with plaintiff as collateral, told such third person that she had signed no such note, but she did nothing more about it, and paid no attention to plaintiff's notice that the note was due: *Held*, that her silence did not amount to a ratification.—*California Bank v. Sayre*, Cal., 24 Pac. Rep. 713.

182. NEW TRIAL—Grounds.—Under Code Civil Proc. Mont. § 295, which declares that "a new trial is a re-examination of an issue of fact," and section 296, subd. 6, providing that a new trial may be granted because the evidence is insufficient to justify the verdict, or because "it is against law," it is no ground for a new trial that the "judgment is against law."—*Froman v. Patterson*, Mont., 24 Pac. Rep. 692.

183. PARTNERSHIP.—The declaration in an action for breach of contract alleged that defendant contracted to form a partnership with plaintiff, and to furnish the capital to carry on the business, which was to be managed by plaintiff; that on the faith of this contract plaintiff gave up a salaried position, and that afterwards defendant refused to perform his part of the contract, whereby plaintiff was damaged: *Held*, that an action lies for the breach.—*Mann v. Bowen*, Ga., 11 S. E. Rep. 862.

184. PARTNERSHIP—Action against Partner.—Under Code Ala. § 2605, providing that any one of the partners may be sued for the obligation of all, a partnership may sue an individual for a debt created by a former partnership composed of defendant and a member of plaintiff firm.—*Alexander v. Jones*, Ala., 7 South. Rep. 903.

185. PARTNERSHIP—Firm and Individual Debts.—Partnership creditors cannot share in the estate of a deceased partner when it is insufficient to pay the separate debts, and the surviving partner or other trustee of the partnership assets, though insolvent, has a joint fund in his hands, especially where a creditor has already shared in a dividend from the partnership fund.—*Claflin v. Tompkins*, Ala., 8 South. Rep. 45.

186. PARTNERSHIP—Firm Name.—A firm name showing the surnames only of the partners is not "a fictitious name," nor "a designation not showing the names of the partners," within Civil Code Cal. § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members.—*Pendleton v. Cline*, Cal., 24 Pac. Rep. 659.

187. PARTNERSHIP—Judicial Sale.—Land conveyed to partners in the firm name is not "the joint property of the associates" within Code Ala. 1886, § 2605, providing that a judgment against partners sued in the common firm name binds the joint property of all the associates, but vests in them individually as tenants in common, and such judgment creditor cannot redeem from a mortgage sale land thus conveyed to the firm.—*Powers v. Robinson*, Ala., 8 South. Rep. 10.

188. PARTNERSHIP—Mines.—An agreement between parties to act together in obtaining a lease of mining property and to work such property as a partnership after the acquisition of the lease does not of itself constitute a partnership, and before the execution of the agreement one party may withdraw with the consent of the others, and another be substituted, without producing any of the consequences of a dissolution.—*Meagher v. Reed*, Colo., 24 Pac. Rep. 681.

189. PATENTS FOR INVENTIONS—Profits.—A finding as to the profit realized in certain months from sales of an infringing article cannot be based solely on a comparison of sales during the corresponding months for the previous and following years.—*Keep v. Fuller*, U. S. C. C. (N. Y.), 42 Fed. Rep. 896.

190. PEDDLERS—License.—Under an ordinance which imposes a fine on persons selling goods from house to house without a license, a sewing machine agent is liable to such fine where he sells by a sample machine carried about with him, whether the sample itself be delivered to the purchaser, or another similar machine, after the bargain is made.—*Spanish Fork City v. Mortenson*, Utah, 24 Pac. Rep. 620.

191. PLEADING—Amendment.—Plaintiff sued defendants for 250 bales of cotton which his petition alleged he had delivered to it, and which on demand it refused to return, and the marks on, and the weight of, each bale, as well as the value of the whole, were set out. He afterwards amended, alleging that he delivered three bales while the balance were delivered by others, but that he had purchased the whole, and a less value was stated, but the marks and weights were the same as those set out in the original petition: *Held*, that the amendment introduced no new cause of action, and hence it was not barred by limitation, though made more than two years after the right accrued.—*Texas Elevator & Compress Co. v. Mitchell*, Tex., 14 S. W. Rep. 275.

192. PLEADING AND PRACTICE—Findings.—A cause tried by the court without a jury having been fully submitted for adjudication, and the court having thereupon directed a judgment on the merits, without having made any express findings upon the issues, *held*, that the remedy for this omission of the court is by application to the court to correct its own omission, and not by appeal from the judgment.—*Williams v. Schembri*, Minn., 46 N. W. Rep. 403.

193. PLEDGE—Factors.—Though a factor may sell, and bind his principal, he cannot pledge the goods as a security for his own debt, even though there have been bills of lading issued to him therefor. The principal may in such case recover the goods of the pawnee, and the pawnee's ignorance that the factor held the goods in the character of factor is no excuse.—*Lalande v. His Creditors*, La., 7 South. Rep. 8 5.

194. PRINCIPAL AND SURETY.—Where persons have become sureties on a bond conditioned that H shall pay for goods to be furnished to him, individually, and H

forms a partnership with another, the sureties are not liable for the default of the firm, though they knew of and consented to its formation, parol evidence being inadmissible to show such knowledge and consent, and thus to vary the terms of the bond.—*Crescent Brewing Co. v. Handley*, Ala., 7 South. Rep. 912.

195. PUBLIC LAND—Boundaries.—A patent from the United States of a surveyed fractional government subdivision, bounded on a meandered lake, conveys the land to the lake, although the meander line of the survey be found to be not coincident with the shore line.—*Everson v. City of Waseca*, Minn., 46 N. W. Rep. 405.

196. PUBLIC LANDS—Cutting Timber.—Rev. St. U. S. § 2461, which forbids the cutting of timber growing on land of the United States which has been reserved or purchased for supplying the timber of the navy, and the cutting or removal of timber from any other land of the United States with intent to export or dispose of the same otherwise than for the use of the navy, does not apply to Indian reservations in Wisconsin, since its object is to protect timber suitable for the use of the navy.—*United States v. Konkapot*, U. S. C. C. (Wis.), 42 Fed. Rep. 64.

197. PUBLIC LANDS—Grants to State.—Where the United States grants land to a State to aid in improving a navigable river, and the State grants the lands covered by the grant to a corporation on condition that it will carry out such improvements, and afterwards, on the corporation's failure to complete the improvements, by act of legislature, releases it from the contract and confirms the grant, congress will be presumed to have notice of such act; and a subsequent resolution of congress, relinquishing to the State certain land which had been erroneously certified by the secretary of the interior as included in the original grant to the State, will inure to the benefit of the corporation, as the State's grantee.—*United States v. Des Moines River Nav. & R. Co.*, U. S. C. C. (Iowa), 43 Fed. Rep. 1.

198. QUIETING TITLE—Remedy at Law.—A purchaser of land at execution sale cannot bring suit to quiet title against another purchaser of the same land under a subsequent execution, in order to determine which has the better title, since the respective rights of the parties may be determined at law.—*Witters v. Sowles*, U. S. C. C. (Vt.), 42 Fed. Rep. 701.

199. RAILROAD BONDS—Bona Fide Holder.—Where overdue railroad mortgage bonds, which belong to the railroad company, are bought at 40 cents on the dollar from the vice-president of the company after suit to foreclose had been begun, and a receiver has taken possession of the mortgaged property, the purchasers of such bonds are not *bona fide* holders where inquiry on their part would have shown that the vice president had no authority to sell the bonds.—*American Loan & Trust Co. v. St. Louis & Chicago Ry. Co.*, U. S. C. C. (Ill.), 42 Fed. Rep. 819.

200. RAILROAD COMPANIES—Accidents at Crossing.—A person who attempts to cross a street which is obstructed by a train of cars by stepping on the coupling pins, and climbing across, without looking to see if there is an engine attached, is guilty of such contributory negligence as will prevent his recovery from the railroad company for injuries sustained by the sudden starting of the train.—*Hudson v. Wabash W. Ry. Co.*, Mo., 14 S. W. Rep. 15.

201. RAILROAD COMPANIES—Injuries.—Where a person not an employee, without permission of a railroad company, and against its will, and without its knowledge, goes into a yard covered and interlaced by tracks, which are being used by the company, by its engines and cars, in switching, drilling, and changing cars, such person is bound to use diligence commensurate with the peril in which he has placed himself; and if he fails to do this he cannot recover for any injury he may sustain from the running of the engines and cars of the company.—*Rome R. Co. v. Tolbert*, Ga., 11 S. E. Rep. 849.

202. RAILROAD COMPANIES—Killing Stock.—In an action for killing plaintiff's horse at a crossing the evidence was conflicting as to whether the required signals were given: *Held*, that it was proper to instruct that, if the signals were not given, defendant was *prima facie* liable for the damages, unless plaintiff's negligence contributed thereto.—*Orcutt v. Pacific Coast Ry. Co.*, Cal., 24 Pac. Rep. 661.

203. RAILROAD COMPANIES—Municipal Aid.—The use of a railroad, though owned by a private corporation, is public to such a degree as to authorize taxation in its support; and Laws Wis. ch. 150, approving and ratifying the act of Douglas county in conveying to a railroad company lands which it held under tax-title, to aid in the construction of the road through the county, is valid.—*Northern Pac. R. Co. v. Roberts*, U. S. C. C. (Wis.), 42 Fed. Rep. 734.

204. RAILROAD COMPANY—Negligence.—In an action against a railroad company by a passenger for injuries received in an accident while the road was being operated by the construction company, admissions of the president of the construction company, who was not at the place of the accident, made several hours after the accident to a reporter, that it would be to his interest not to have too much published about the accident; that the track was put there temporarily, etc.; and that he did not want public opinion too strong against him—are not admissible against the railroad company, as they were neither part of the *res gestæ* nor made in the pertormance of his duty.—*Chattanooga, R. & C. R. Co. v. Liddell*, Ga., 11 S. E. Rep. 853.

205. RAILROAD COMPANIES—Use of Street.—A steam railroad company which, under license from the city authorities, lays its track upon the surface of a street, is not liable for damages resulting from a reasonable use thereof to the easement of an abutting lot-owner, who does not own the fee of the street. Reversing 50 Hun, 603, *mem.*—*Forbes v. Rome*, N. Y., 24 N. E. Rep. 919.

206. REAL ESTATE AGENT—Compensation.—Under a contract to make one sole agent to sell lots at a commission, "which shall be in full for any service he may render in surveying and laying out the land," the agent cannot, when he has made no sales, recover on a *quantum meruit* for the service, the owner having put prices on the lots, and given him the agency.—*Gilbert v. Judson*, Cal., 24 Pac. Rep. 643.

207. REMOVAL—Federal Court.—On petition of non-resident heirs, a case involving the probate of a will was, by order of the circuit court of the United States, removed to that court from a State court: *Held* that, though it was doubtful whether the circuit court had jurisdiction to remove such a case, it was for that court to decide the question.—*Brodhead v. Shoemaker*, Ga., 11 S. E. Rep. 845.

208. REMOVAL OF CAUSES—Corporations.—A petition for removal of a cause by a corporation of one State sued in the courts of another State is not sufficient unless it alleges, in addition to the usual averments as to citizenship, that it is a non-resident of the State in which it is sued.—*Hirschl v. J. I. Case Threshing Mach. Co.*, U. S. C. C. (Iowa), 42 Fed. Rep. 803.

209. REMOVAL OF CAUSES—Criminal Prosecution.—Under Rev. St. U. S. § 643, which provides that, when any civil suit or criminal prosecution "is commenced" in a State court for an act done by an officer under the revenue laws of the United States, the same may be removed into the United States circuit court, a prosecution is "commenced" when the warrant is issued and the arrest made by the State officers, and it is no objection to the removal that no indictment has yet been found in the State court; and that there is no provision in the federal law for indictment for offenses against the State law.—*State of North Carolina v. Kirkpatrick*, U. S. C. C. (N. C.), 42 Fed. Rep. 689.

210. REMOVAL OF CAUSES—Local Prejudice.—Since Act

Cong. March 3, 1887, which provides for the removal of causes on the ground of local prejudice, does not prescribe any mode of procedure, a petition for removal, accompanied by an affidavit by a person authorized to make it, stating of his own knowledge the existence of prejudice and local influence, is sufficient to justify an order of removal.—*Cooper v. Richmond & D. R. Co.*, U. S. C. C. (Ga.), 42 Fed. Rep. 697.

211. REMOVAL OF CAUSES—Local Prejudice.—Under Rev. St. U. S. § 641, providing for removal of a cause before final hearing, "when any civil suit or prosecution is commenced in any State court, for any cause whatever, against any person who is denied, or cannot enforce in the judicial tribunals of the State, * * * any right secured to him by any law providing for the equal civil rights of a citizen," a prosecution against a Chinaman for having in his possession a lottery ticket, under a law applying to "any person," cannot be removed on the ground of local prejudice or maladministration of the law.—*State of California v. Chue Fan*, U. S. C. C. (Cal.), 42 Fed. Rep. 865.

212. REPLEVIN OF MORTGAGED GOODS.—Upon suit on a mortgage to recover the property *in specie* Code Ala. 1886, § 2720, provides that the defendant may, upon suggestion, require the jury to ascertain the amount of the mortgage debt:" *Held*, on the general issue, that evidence was admissible to show the amount of damages resulting from a failure of the mortgagee to furnish the full consideration of the mortgage debt as agreed, and that a suggestion is necessary to require the jury to ascertain the amount of said debt.—*Harper v. Weeks*, Ala., 8 South. Rep. 39.

213. RESULTING TRUST—Husband and Wife.—A resulting trust arises by operation of law from contemporaneous circumstances which give the legal and equitable titles different directions, and it must therefore arise at the instant the deed is taken, and the legal title is vested in the grantee, and the situation of the transaction when the title passes is to be looked to, and not the situation preceding or following that time.—*Whitley v. Ogle*, N. J., 20 Atl. Rep. 284.

214. RIPARIAN RIGHTS—Adverse Use of Water.—A "squatter" who enters upon, occupies, and cultivates part of the riparian land of another, claiming adversely in the belief that it is government land, can gain no title to the use of the waters of the stream by diverting and using them for the purpose of irrigating such land, since such use inures to the benefit of the true owner, and is not adverse to him. And it can make no difference that the land irrigated does not border on the stream, since such land is not segregated in title by the occupancy, but remains part of the entire riparian tract.—*Alta Land & Water Co. v. Hancock*, Cal., 24 Pac. Rep. 645.

215. SALE—When Title Passes.—Libelant contracted to sell and deliver along side of a chartered vessel, for loading, a quantity of phosphate rock. He had a copy of the charter-party in his possession, and selected the stevedore and lighterman himself to deliver the rock. After several lighters had been delivered and made fast to the vessel, one of them capsized. Libelant took bills of lading to his own order, and surrendered the receipts of the ship master for all the rock except the load thus lost, the receipt for which he retained: *Held*, that libelant showed an intent not to pass the property in the lost rock, but to retain the *jus disponendi*, and a suit therefor against the vessel was properly brought in his own name as owner.—*Guerard v. The Lovspring*, U. S. D. C. (S. C.), 42 Fed. Rep. 853.

216. SALE OF GOOD WILL.—Defendant sold plaintiff his business and good-will, and agreed not to again engage in the same business in D. *Held*, upon action for breach of contract, that it was error to charge that the value of the good-will should be ascertained by deducting from the gross sum paid, the value of the property purchased other than the good-will, and to leave the assessment of damages to the speculative discretion of the jury, with no rule to guide it other than that damages should not exceed those asked.—*Howard v. Taylor*, Ala., 8 South. Rep. 36.

217. SALE UNDER EXECUTION.—The purchaser of land under an execution, which issued from the federal court, and was in the hands of the marshal before the defendant therein had made a lease of the land, is entitled to the rent due and unpaid under such lease, as against one who had purchased the note given for such rent, without notice of the execution creditor's claim.—*Kirkpatrick v. Boyd*, Ala., 7 South. Rep. 913.

218. SCHOOLS AND SCHOOL DISTRICTS—Census.—The Montana school law (Comp. St. Mont. §§ 1886, 1907) requires the clerk of each school district to take a census at stated intervals of all the children of a given age within his district, and the county school superintendent is then to apportion the school moneys to the several districts according to the number of children they contain: *Held*, that where the census returns, as residents of one district, children whose fathers reside and who attend school in other districts, it is proper for the superintendent to transfer them to the latter districts, and apportion the money accordingly.—*School-Dist. No. 7 v. Patterson*, Mont., 24 Pac. Rep. 698.

219. SPECIFIC PERFORMANCE — Options. — Defendant agreed in writing to give plaintiff the option to purchase his land within a given time at a named price, a consideration for such option being stated. The purchase was not completed, and at the end of the time defendant made, on the agreement, and signed, a memorandum extending the option for 10 days, but there was no new consideration: *Held*, that the new option was *nudum pactum* and void.—*Ide v. Leiser*, Mont., 24 Pac. Rep. 695.

220. STREET RAILWAYS—Occupancy of Street.—Where two or more street railway companies have the right to lay tracks in the streets of a city, the one which first, in good faith, begins and diligently prosecutes the construction of a railway upon a street or system of streets acquires the right of occupancy to the exclusion of the others; but a company which is authorized by charter to build a cable road only, acquires no right by commencing the construction of a horse or electric road, and another company which, in good faith, and in pursuance of its charter, afterwards begins the construction of a road upon the same streets, is entitled to an injunction against it.—*Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, Ind., 24 N. E. Rep. 1055.

221. TAXATION — Assessment.—Plaintiffs made the statement on oath, for purposes of assessment, required by Pol. Code Cal. §§ 3629, 3630, to the effect, that all the property owned or controlled by them was a warehouse and the land on which it was situated. At the assessor's request they also gave him a memorandum of all personalty stored in such warehouse for which they had issued receipts, and of which they informed him they were not the owners: *Held*, that the assessor has no authority to arbitrarily add to the value of such personalty to the amount returned by plaintiffs where he has not cited them to appear and answer under oath as to their property, as section 3632 provides he may do if he believes the statement to be false.—*Weyse v. Crawford*, Cal., 24 Pac. Rep. 735.

222. TAXATION—Assessments.—Under Rev. St. U. S. § 5219, which declares that nothing in the national banking act shall prevent all the shares of stock of a national bank from being included in the assessment of the personal property of the owners of such shares, an assessment of the entire stock of a national bank *in solido* against the bank itself is invalid.—*National Bank of Virginia v. City of Richmond*, U. S. C. C. (Va.), 42 Fed. Rep. 877.

228. TAXATION—Bridges.—A city whose corporate limits extend to low-water mark on the opposite side of the Ohio river has authority to make an assessment for railroad and school taxes of the district constituted by such city, against a railroad bridge built across the river, where the city granted the land on which the approaches of the bridge are built, reserving as a consideration therefor the right to tax the bridge itself, and all its appurtenances within the corporate limits of the city.—*Henderson Bridge Co. v. City of Henderson*, Ky., 14 S. W. Rep. 85.

224. TAXATION—Charitable Corporations.—A corporation owning real estate, the products of which are exclusively expended in the training and furnishing of persons for charitable purposes, such as the visitation of the sick, the care of hospitals, of orphanages and poor schools, is exempted from taxation by force of the fifth section of the act concerning taxes. Magie, J., dissenting.—*State v. Collector of Chatham*, N. J., 20 Atl. Rep. 292.

225. TAXATION—Wild Lands.—The provision of any statute requiring lands to be classified before assessed for taxation are in general imperative.—*Brown v. Powell*, Ga., 11 S. E. Rep. 866.

226. TAX SALE—Infant.—The fact that an infant defendant is not represented by a guardian in an action to enforce a tax-lien on his land does not render the judgment void, but merely erroneous.—*Keller v. Wilson*, Ky., 14 S. W. Rep. 332.

227. TELEGRAPH COMPANIES—Negligence.—When the blank upon which the sender of a telegraphic message writes and signs the same has printed upon its face the words, "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," he is chargeable with knowledge of and assent to the terms and conditions thus inuicated. Such a stipulation is reasonable and therefore obligatory.—*Hill v. Western Union Tel. Co.*, Ga., 11 S. E. Rep. 874.

228. TRADE-MARK—Infringement.—The use of the words "microbe killer" on a label does not constitute a trade mark; they being English words, in common use, and of fixed meaning.—*Alf v. Radam*, Tex., 14 S. W. Rep. 164.

229. TRIAL—Communications to Jury.—The trial of a case is not concluded until a verdict has been rendered or the jury discharged. It is the duty of parties and counsel to remain in, or be represented at, the court during its sessions until the trial is ended; and it is no part of the duty of the court to send after parties or counsel who have absented themselves from the court-room before the trial of their cause is concluded.—*Hudson v. Minneapolis L. & M. Ry. Co.*, Minn., 46 N. W. Rep. 314.

230. TRIAL—Disqualification of Juror.—Where a juror answers on his *voir dire* that he has formed no opinion as to the guilt or innocence of defendant, but it transpires after a verdict of "guilty" that he had been on the grand jury which found the indictment, it is proper to grant a new trial; defendant not having discovered the disqualification of the juror, or been put on inquiry concerning it, before the verdict.—*United States v. Christensen*, Utah, 24 Pac. Rep. 618.

231. TRIAL—Exception to Instructions.—Under Code Ala. § 2758, which permits a party to reserve by bill of exceptions any charge or decision of the court that would not otherwise appear of record, the exception must be taken before the jury retires; and an exception to a portion of the general charge comes too late when taken after the jury has returned and asked for further instructions.—*Hays v. Solomon*, Ala., 7 South. Rep. 921.

232. TROVER AND CONVERSION.—A written instrument executed as security for the payment of a promissory note, which transfers the maker's title in specifically described chattels to the payees, with power of sale in case of default, gives them such an interest in the property as will enable them, after default, to maintain trover against a subsequent purchaser from the maker, with notice of their rights.—*Johnson v. Osborn*, Ga., 11 S. E. Rep. 841.

233. TRUSTS—Limitation of Actions.—Where one having corporate stock standing in his name sells it to another, and gives a receipt for the money, reciting that it is the first installment on a certain number of shares of the stock "standing in my name, but owned by him, and he remaining responsible for the balance of the installments when called in," but containing no agreement as to the future disposition of the stock or the dividends therefrom, the transaction raises an implied trust against which the statute of limitations will run.—*Cone v. Dunham*, Conn., 20 Atl. Rep. 311.

234 USURY—Lex Fori.—A note was executed in Georgia by a resident of that State, and secured on land situate therein, in consideration of a loan by the agent of a resident of Massachusetts, where the note was made payable. The agent retained out of the sum for which the note was given an amount of interest which was usurious under the laws of Georgia: *Held*, that, though, as a general rule, the interest which a contract should bear is governed by the law of the place where it is to be performed, the note would not be enforced in Georgia to the extent of the usury.—*Kilcrease v. Johnson*, Ga., 11 S. E. Rep. 870.

235. VENDOR AND VENDEE—Bona Fide Purchaser.—One who purchases real estate is bound to know who is in possession thereof, and is chargeable with notice of the occupant's title; and therefore a purchase of premises, occupied in part by third persons under an unrecorded lease, cannot be heard to say that he is an innocent purchaser, though he in fact was ignorant of the occupancy.—*Sheerer v. Cuddy*, Cal., 24 Pac. Rep. 713.

236. VENDOR AND VENDEE—Options.—Where one purchases an option on real estate for a sum which is to be forfeited in case the purchase of the land is not closed by a certain date, and the seller is not the owner of the whole title he contracts to convey, the purchaser, on learning of the defect, may rescind the contract and recover the amount paid, though the seller offers after notice of rescission to perfect his title, but fails to do so in time.—*Burks v. Davies*, Cal., 24 Pac. Rep. 613.

237. VENDOR AND VENDEE—Possession under Contract.—Defendant contracted that he and his wife would convey to plaintiff for a certain sum land belonging to the wife. Plaintiff entered on the land, and made improvements, though nothing was said in the contract as to possession, and neither defendant nor his wife consented to his entry. Afterwards the wife refused to convey: *Held*, that plaintiff had no right to the possession, and hence is not entitled to recover the value of his improvements as damages for breach of the contract.—*Cartin v. Hammond*, Mont., 24 Pac. Rep. 627.

238. WAY OF NECESSITY—Pleading.—On a grant of land to which there is no access except by a private road laid out and used by the grantor over his other lands, a right to use the road passes as a way of necessity.—*Barnard v. Lloyd*, Cal., 24 Pac. Rep. 658.

239. WILL—Construction.—A testator directed that, in the event of the death of one son without issue living at his death, then his portion was to be divided equally among the children of another son: *Held*, that only those children who were living at the time of the death of the former son without issue took under the will.—*Phinizy v. Foster*, Ala., 7 South. Rep. 836.